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Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D. C.

William J. Reinhart, Petitioner,	)	
v.	)	**6th Cir. No. 01-3283**
	)	**USDA No. 99-0013**
United States Dep't of Agriculture, Respondent.	)	

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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ORAL ARGUMENT REQUESTED

February 2003

37 pp

QUESTIONS

1. Whether the failure by the United States Department of Agriculture to serve Petitioner within the 30-day statutory time for appeal, resulting in Petitioner's appeal being filed beyond the 30-day period, is an issue of denial of due process on Petitioner or the denial of jurisdiction by the Sixth Circuit Court of Appeals for late filing not excused under the principle of equitable tolling? The only method of notification by the U.S.D.A. is by certified mail and no public docket is maintained.

2. Whether the United States Congress exceeded its authority under the Commerce Clause with passage of the Horse Protection Act (15 U.S.C. §§ 1821 - 1831)? This Act extends regulation under the commerce clause to an amateur recreational activity. The prohibited activity (namely, the exhibition of a "sore" horse) has no effect on interstate commerce, much less a substantial impact, the standard which this Court has established.

3. Whether the division between the Fifth and Sixth Circuits, United States Courts of Appeal, on the reliability of the method and evidence used by the United States Department of Agriculture constitutes a denial of equal protection of the law against Petitioner? The Fifth Circuit has ruled successively that the method and evidence which the U.S.D.A. presents in its prosecution of cases under the Horse Protection Act (palpation of a horse's feet) is not substantial or reliable evidence upon which a violation can be supported. The Sixth Circuit Court of Appeals apparently upholds the method and evidence of the U.S.D.A. (palpation of a horse's feet) as reliable and substantial. This is a clear division between the two most important circuits on the only method and evidence presented in these cases. Petitioner asks this Court to resolve this division so that citizens are accorded equal protection of the law.

PARTIES TO THE PROCEEDING:

William J. Reinhart and his wife Judith Reinhart breed, train and exhibit Tennessee walking horses as a retirement activity. They own all horses they train and exhibit. Prior to this retirement activity, William Reinhart:

EDUCATION: University of Alabama - 1957 - 1962
Bachelor of Arts Degree - Political Science/Economics - 1960
Masters of Arts Degree - Political Science/Economics - 1962
1 Year - University of Alabama School of Law

EXPERIENCE: Forty years working with state and local governments as well as state and national associations representing state and local government officials on intergovernmental relations:

> Intergovernmental advisor to the Governor of the State of Tennessee;
> Urban Development Coordinator and intergovernmental advisor to the Mayor of Metropolitan Nashville-Davidson County, Tennessee;
> Twenty years as Senior Intergovernmental Policy Consultant to the National League of Cities/U. S. Conference of Mayors;
> Intergovernmental policy advisor to the Tennessee Municipal League;
> Intergovernmental specialist on many projects with states and municipal governments and federal agencies.

The Respondent is the Secretary of the United States Department of Agriculture as represented by the Solicitor General of the United States.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit, No. 01-3283, issued on September 24, 2002, on a petition for rehearing en banc, is not reported, but is included in the Appendix hereto.

The opinion of the United States Court of Appeals for the Sixth Circuit, No. 01-3283, issued on July 10, 2002, was not recommended for publication but is included in the Appendix hereto.

An order of the United States Court of Appeals for the Sixth Circuit, No. 01-3283, issued on July 6, 2002, on the question of jurisdiction, is not reported, but is included in the Appendix hereto.

A stay order of the United States Department of Agriculture, HPA Docket No. 99-0013, issued on June 20, 2001, is not reported but is included in the Appendix hereto.

The order denying William J. Reinhart's petition for reconsideration by the Judicial Officer of the United States Department of Agriculture, HPA Docket No. 99-0013, issued on January 23, 2001, is reported at 60 Agric. Dec. ___ (Jan. 23, 2001) and is included in the Appendix hereto.

The decision and order of the Judicial Officer of the United States Department of Agriculture, HPA Docket No. 99-0013, issued on November 9, 2000, is reported at 59 Agric. Dec.___, slip op. (Nov. 9, 2000) and is included in the Appendix hereto.

The decision and order of the Administrative Law Judge of the United States Department of Agriculture, HPA Docket No. 99-0013, issued on June 5, 2000, is not reported but is included in the Appendix hereto.

STATEMENT OF BASIS FOR JURISDICTION

The judgment of the Sixth Circuit Court of Appeals for the United States was entered on July 10, 2002. A petition for rehearing en banc was denied on September 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 8(3).

United States Constitution, Article V, Amendments.

United States Constitution, Article XIV, § 1, Amendments.

Pub. Law 91-540, Dec. 9, 1970, 84 Stat. 1404: P.O. 94-360, July 13, 1976, 90 Stat. 915, 15 U.S.C. §§1821 - 1831, The Horse Protection Act.

Tennessee Code Annotated, Section 39, Chapter 14, Part 23.

STATEMENT OF CASE:

I. This is an appeal from the United States Sixth Circuit Court of Appeals' Opinion dated July 10, 2002, denying jurisdiction on the grounds that the Appeal was not timely filed, and the subsequent denial of a Petition to Rehear dated September 24, 2002. The reason for the "so-called" late filing was the admitted illegal action of the United States Department of Agriculture ("U.S.D.A."), which is the prosecuting agency of the Horse Protection Act (P.L. 91-540, Dec. 9, 1970, 84 Stat. 1404: P.O. 94-360, July 13, 1976, 90 Stat. 915, 15 U.S.C. §§1821 - 1831) ("H.P.A."), by failing to serve the Petitioner with its final action until 4 days after the statutory period for appeal under the H.P.A. had passed. This conduct constitutes prosecutorial misconduct and is a violation of Petitioner's due process rights under the U. S. Constitution, Article V.

The U. S. Sixth Circuit Court ignored the relevant cases briefed by Petitioner on the jurisdictional issues in this matter and relied instead upon cases dealing with equitable tolling of the time for appeal that are irrelevant in the present case as the following brief will show.

II. The substance of the Appeal grows out of a finding by the U.S.D.A. that Petitioner violated the Horse Protection Act. The substantive issues raised in the Appeal are as follows:

A. A first impression constitutional challenge (Art. I, §8(3)) to the Horse Protection Act, based on this Court's rulings in *United States v. Alfonso Lopez,* S. Ct. 93-1260, April 1995 and *United States v. Morrison*, 529 U.S. 598 (2000).

B. A constitutional challenge (Art. XIV, §1) under the Equal Protection Clause of the United States Constitution based on the U. S. Fifth Circuit Court of Appeals' rulings in

Bill Young and Floyd Sherman v. United States Department of Agriculture, 53 F.3d 728 (5th Cir. 1995) and *David Tracy Bradshaw v. United States Department of Agriculture*, No. 00-60582 (U. S. Court of Appeals for the Fifth Circuit, May 14, 2001) totally rejecting the reliability of the methods used by the U.S.D.A. in prosecuting cases under the H.P.A.

The illegal action of the U.S.D.A. by failing to follow the statute and properly serve Petitioner, is particularly egregious because employees of this executive branch agency (the U.S.D.A.), are the investigators, the prosecutors, the judge, and the jury. In the present case, by not properly serving Petitioner, the U.S.D.A. is exercising what amounts to a pocket veto of the requirement under the H.P.A. for judicial review. The decision of the Sixth Circuit Court condones these actions.

This is a prescription for the most dangerous tyranny which the American system faces. The regulation of more and more sectors of American life is being handled in the executive branch of government under administrative prosecutorial systems. The combination of prosecutorial, judicial and administrative functions in these systems are a departure from the wisdom of the Constitution which separates these powers into independent branches. The only justification for this system is the requirement for judicial review. In the present case, the illegal action of the administrative prosecuting agency has effectively annihilated the separation of powers safeguard. Petitioner asks this Court to protect this fundamental safeguard.

JURISDICTION

Facts in the Record

1. The Horse Protection Act provides that the time allowed for filing a Petition for Review with the Court of

Appeals from a Final Order of the Judicial Officer of the U.S.D.A. is 30 days.

2. The U.S.D.A. Judicial Officer signed the order denying the Petition for Reconsideration on January 23, 2001.

3. The Clerk of the U.S.D.A. sent, by certified mail, erroneous material to Petitioner which was received by Petitioner on February 5, 2001.

4. Petitioner immediately called the U.S.D.A. Clerk and advised her of the erroneous material and was instructed to return this material which Petitioner returned on February 7, 2001 by certified mail. Petitioner was also advised that no information was available on his case.

5. Petitioner received the correct order by certified mail on February 26, 2001, 34 days from the date the order denying Petition for Reconsideration was signed. All of the above facts on the exact dates are supported by receipts from the U.S. Postal Service.

6. Petitioner filed his notice of appeal within the 30 day period from receipt of the order denying Petition for Reconsideration.

7. The U.S.D.A. has adopted, under its rules of practice under the Horse Protection Act, service of process by certified mail. (§1.147. *Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary* (U. S. D. A., Effective Date April 20, 1996).

8. The Sixth Circuit Court of Appeals ruled that the appeal was not timely filed even though the U.S.D.A. admits that Petitioner did not receive the denial of his Petition for Reconsideration for 34 days. The U.S.D.A. completely controls its adopted method of service and the U.S.D.A.

maintains no public docket of its cases.

Dealing with these facts, the Sixth Circuit Court stated:

"The U.S.D.A., however, concedes that a clerical error on its part contributed to Reinhart's delay in filing his notice of appeal. Specifically, the U.S.D.A.'s Office of the Hearing Clerk mistakenly sent Reinhart a decision from a totally unrelated case rather than the order denying his petition for reconsideration. The record does not indicate when Reinhart received this decision, but the U.S.D.A. acknowledges that Reinhart notified it of the mistake and that the decision from his case was then sent out to him on February 15, 2001. Reinhart did not receive this order until February 26, 2001, 34 days after the order was issued and 4 days after the time period for appealing that order had expired."

. . . .

"Only the Supreme Court or Congress can alter the current rule that prohibits equitable tolling under the circumstances of this case." **(Opinion, *William J. Reinhart v. United States Department of Agriculture*, No. 01-3283, United States Court of Appeals for the Sixth Circuit, July 10, 2002, p. 5)**

The Court and the U.S.D.A. cite several cases that purport to be controlling on the question of the time limit for filing an appeal in this case stating that such time limits are *". . . .mandatory and jurisdictional and not subject to equitable tolling."* (Id., *Reinhart*)

In the *Kelly* case, the only case decided under the time period for filing an appeal under the Horse Protection Act, Petitioner Kelly was served within six days of the date of the final order but sent his appeal to the wrong court and by the time it reached the proper court, was one day late and, hence, was untimely filed.

In *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995), the time for filing an appeal was 45 days. Petitioner Stone did not file an appeal within this time limit but instead filed a Petition for Reconsideration that took 17 months to conclude. The Court ruled that the Petition for Reconsideration did not toll the time for filing an appeal.

In *Brown v. Dir., Office of Workers' Comp. Programs,* 864 F.2d 120, 124 (11th Cir. 1989), appellant was served well within the period for filing an appeal. His notice of appeal was received one day late. Appellant argued for equitable tolling based on the date he mailed his appeal, eight days before the deadline, but received one day after the statutory period for filing. The Court ruled his notice of appeal was not timely filed.

In all of the above cases, appellants were served within the statutory period but, for a variety of reasons, were late in filing their appeals. These cases are all to be distinguished from the present case where Petitioner was not served within the statutory period for filing an appeal.

In its Opinion, the Sixth Circuit Court cites one case where there was no actual service by the clerk but appellant found out about the order, so there was notice. *In re Delaney,* 29 F.3d 516, 518 (9th Cir. 1994), appellant had 10 days from the date of entry to file an appeal under Bankruptcy Rule 8002(a). The notice of appeal was filed 13 days after the appeal time expired. Appellant argued that she was not served, but admitted she knew of the order. Here there was no actual service by the clerk but there was actual knowledge of the order. The court ruled the appeal was untimely filed and stated, *". . . . that if she had checked the docket sheet she would have determined the date of entry."* (*In re Delaney*, 29 F.3d 516, 518 (9th Cir. 1994))

The U.S.D.A. cites *Polylok Corp. v. Manning,* 793 F.2d

1318, 1320 (D.C. Cir. 1986), which deals with the rules for filing a timely notice of appeal. In that case the district court granted the defendants motion to dismiss on April 24, 1985. The order of dismissal was filed the next day, April 25. Defendants received notice of this order on April 26. *Polylok*, the plaintiff, asserts that it did not receive notice nor a copy of the court's order until July 10, 1985. The court said:

"The appellate rules require the potential appellant to file a notice of appeal with the district court clerk 'within 30 days after the date of entry of the judgment or order appealed from.' Fed. R. App. P.4(a)(1). The district court may extend this period to sixty days 'upon a showing of excusable neglect or good cause.' Fed. R. App. P. 4(a)(5). . . . In the normal course, prospective appellants have no difficulty satisfying Rule 4 because the rules also require that the clerk serve notice of the entry of an order or judgment by mail upon each party. . . ." **(*Polylok Corp. v. Manning,* 793 F.2d 1318, 1320 (D.C. Cir. 1986))**

In the present case, the Judicial Officer signed the order on January 23, 2001, and Petitioner received the erroneous material 13 days later on February 5, 2001 by certified mail. Immediately upon receipt of this material, Petitioner called the clerk on February 6, 2001, and the clerk said there was no information available on Petitioner's case. It then took the clerk an additional 10 days to mail the order denying the Petition for Reconsideration - a total elapsed time of 23 days before the order was even mailed. This time sequence does not meet the requirement that: *"Immediately upon entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party . . . . and shall make a note in the docket of the service."* (Fed. R. Civ. P. 77(d)

The decision by the 9th Circuit, not cited by this court nor the U.S.D.A., in *Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340 (9th

Cir. 1988) provided ample authority for the Sixth Circuit to take jurisdiction of this case even under the framework of equitable tolling. In *Zurich*, the court signed an order denying mortgagee's motion for a new trial and for amendment of the judgment:

"This order was signed by the court and entered on June 6, 1986. Notice of its entry, however, was not received by the Mortgagee. On July 9, 1986, counsel for the Mortgagee talked by telephone to the clerk of the court and was told that the order had not been entered. The Mortgagee learned of the entry of the order only on August 8, 1986. " (*Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340 (9th Cir. 1988))

The telephone conversation between mortgagee and the clerk occurred 33 days after entry of the order. Mortgagee did not learn of the entry until August 8, an elapsed time of 62 days. In *Zurich*, the time for filing a notice of appeal was 30 days after the entry of judgment. Dealing with these proceedings, the court said as follows:

"[1] The failure of the clerk to give notice is not a ground, by itself, for a finding of excusable neglect, but is a factor to be considered along with other circumstances. Id. at 460. In this case, the clerk failed to give notice and then told counsel that the order had not been entered. Counsel exhibited sufficient diligence in checking with the clerk. His reliance on the clerk's representation was an excuse for failing to file within the prescribed time. There was no prejudice to the Insurer, especially as the trial judge had indicated at the hearing on the motion for a new trial his expectation that an appeal would be taken." (Id., *Zurich*)

In *Zurich*, mortgagee did not telephone the clerk for a period of 33 days after the order was entered, and, yet, the court did not place the total burden on the mortgagee to check the docket. In *Zurich*, since this was a decision by a

district court, there was a docket to check. In the present case, Petitioner telephoned the clerk within 13 days of the signing of the order and was told that no information was available on his case and there is no public docket to check.

The Sixth Circuit Court apparently mistakenly perceived this case as one of an untimely filing of an appeal not excused by equitable tolling. The only thing in the Sixth Circuit Court's opinion that attempts to rationalize its decision with the facts in this case is the following statement:

"Nevertheless, Reinhart neither checked the docket nor called the clerk to see if the Secretary had ruled on his petition for reconsideration." (Opinion, *William J. Reinhart v. United States Department of Agriculture*, No. 01-3283, United States Sixth Circuit Court of Appeals, July 10, 2002, p. 4).

This statement by the Court is in factual error on every point. First, there is no docket to check under the U.S.D.A. system; and secondly, Petitioner called the U.S.D.A. on February 6, 2001 and told the Clerk he had received material on a case that did not pertain to him. The Clerk advised that an obvious mistake had been made and to return the material. In the same telephone conversation, the Clerk advised Petitioner that no information was available on his case. In a different section of its opinion, the Court acknowledges this communication in the following language: *"....but the U.S.D.A. acknowledges that Reinhart notified it of the mistake and that the decision from his case was then sent out to him on February 15, 2001.* (Id. *Reinhart*). Further proof of this communication between Petitioner and the Clerk of the U.S.D.A. on February 6, 2001, is that in response to a direct question at oral argument, Petitioner told the Court that he did call the Clerk to notify her of the erroneous material and to check on the status of his case.

The above cases cited by the Sixth Circuit Court on

equitable tolling are in stark contrast to the case at bar. In every case cited, petitioners were served within the 30 day period in one form or another but were simply late in filing their appeals for different reasons. In the present case, Petitioner was never served with the opinion in his case in any form whatever and, in fact, was advised by the Clerk that no information was available on his case on February 6, 2001. Thus, the opinion of the Sixth Circuit Court places a burden on the Petitioner that is impossible to comply with since the U.S.D.A. does not maintain a public docket.

The Horse Protection Act is silent as to the method for service of process in the prosecution of cases under the H.P.A. The U.S.D.A. has adopted as its chosen method of service of process its published, *Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary* (United States Department of Agriculture, Effective Date April 20, 1996) which provides in relevant part that service of process is upon receipt by certified mail and the courts have ruled that service must be immediate.

This method was obviously chosen by the U.S.D.A. because the agency does not maintain a public docket of its cases as Federal courts are required to do. In its Brief for Respondent, the U.S.D.A. acknowledges that Petitioner's petition for review by the Sixth Circuit was timely filed:

***"Reinhart filed a petition for reconsideration of the Secretary's decision, and that petition was denied on January 23, 2001. A copy of the denial of the petition for reconsideration was served on Reinhart on February 28, 2001. Reinhart filed a timely petition for review with this Court on March 23, 2001."* (Id. *Reinhart*).**

This is controlling evidence that under the U.S.D.A. service of process system, there is no justification for not serving Petitioner within the 30 day period.

Petitioner has argued and briefed to the Sixth Circuit that this is not a case of equitable tolling on the late filing of an appeal but is simply a denial of due process because the U.S.D.A. did not serve Petitioner in any form during the 30 day period for an appeal. The U. S. Supreme Court said in *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) that:

***"The requirement that a federal court has personal jurisdiction flows from the Due Process Clause of the Fifth Amendment of the U. S. Constitution. (Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).**

"An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action and brought under a court's authority by formal process. In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. (See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444--445 (1946)" (Supreme Court of the United States, No. 97-1909, Murphy Brothers, Inc., Petitioner v. Michetti Pipe Stringing, Inc., On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, [April 5, 1999]."

The issue in *Omni Capital* was whether a private cause of action existed under the Commodities Exchange Act on a foreign corporation. The court found that the act was silent about service of process. After reviewing all federal and state rules and cases, the Court could find no authority for jurisdiction. Hence, the claim against defendant was dismissed on constitutional grounds.

In the case of *United States v. Ziegler Bolt and Parts Company*, 95-1408, - 1419 (April 14, 1997), the court found that after several steps had transpired in the legal process petitioner had raised a proper defense of insufficient service from the beginning and the court dismissed the complaint against petitioner, stating: *". . . specifically, the court lacks personal jurisdiction over Ziegler and the complaint was barred because of insufficient service of process." (United States v. Ziegler Bolt and Parts Company*, 95-1408, - 1419 (April 14, 1997)). In *Ziegler*, the government served its process on defendant's attorney instead of the defendant directly or on any member of the company who was authorized under the rules to accept service. The court ruled that even after several stages of the prosecution had gone forward, the government's failure to meet the requirement of proper service of process was a violation of the constitutional requirement for due process and sustained a dismissal of the complaint.

Petitioner believes that these cases are clear and on point, namely, that the United States government must satisfy the procedural requirement of service of process at every step of its complaint. In the present case, the U.S.D.A. failed to do so and thereby forfeits the government's jurisdiction in this case. Because of the pleadings below, the U.S.D.A. was put on notice that an appeal was to be expected on constitutional grounds. The requirement of service of process in this case under the authority cited above argues for the dismissal of this complaint and the award of damages to Petitioner for all costs incurred after the failure of the U.S.D.A. to meet its requirement for service of process, and was so pled to the Sixth Circuit Court of Appeals.

While Petitioner believes that he has set forth the proper resolution of this case, in the event this Court finds a way to hear the constitutional arguments in this case, the constitutional arguments are presented herein.

Constitutionality of the Horse Protection Act Under the Commerce Clause of the United States Constitution

Petitioner has argued throughout these proceedings that the Horse Protection Act (15 U.S.C. §§ 1821-1831) is an unconstitutional exercise of power by Congress and all activities of the Secretary of Agriculture in enforcing this Act are without legal authority. This Act was passed under the Commerce Clause of the U. S. Constitution (Art. I, § 8(3)). Section 3, (3) and (4) of the Act state:

"(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this Act are either in interstate or foreign commerce or substantially affect such commerce;"

The regulated activity under the Horse Protection Act, 15 U.S.C. §1825 (b)(2) is:

"(a) showing or exhibiting in any horse show or horse exhibition of any horse which is sore; and

(b) entering for the purpose of showing or exhibiting in any horse show or horse exhibition any horse which is sore."

Nowhere in the legislative history of the Horse Protection Act nor in the Act itself is there ever a connection between the regulated activity and the effect of the regulated activity on commerce.

In *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez v. United States*, 402 U.S. 146, 155-158 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964), the Courts have said that

both in the legislative background and in the substance of the Act, Congress is required to justify by quantitative information and rational analysis the basis of its actions under the Commerce Clause of the U. S. Constitution. In the substance of the Horse Protection Act and in its legislative history, there is no quantitative information and no rational analysis that showing or exhibiting a sore horse has anything to do with interstate commerce. In *United States v. Lopez* (S. Ct. 93-1260, April 1995) and *United States v. Morrison*, 529 U.S. 598 (2000), after reviewing the entire history of the Supreme Court's decisions under the Commerce Clause, the Court stated: *"We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially effects interstate commerce.'"*

The U.S.D.A., in its Brief to the Sixth Circuit, advances the following arguments to support the constitutionality of the Horse Protection Act under the Commerce Clause:

"There are three broad categories of activity that Congress may regulate under its commerce power: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) those activities having a substantial relation to interstate commerce. United States v. Napier, 233 F.3d 394, 399 (6th Cir. 2000), citing Morrison, 529 U.S. at 609. The HPA clearly intends to regulate under the third category, so the Supreme Court's analytical framework under United States v. Lopez, 514 U.S. 549 (1995) and its progeny Morrison come into play.

. . . .

The major Tennessee Walking Horse shows, including the Trainers Show and the National Celebration, attract as competitors horse owners and trainers from around the country. The show class in which "Double Pride Lady" was

entered featured 13 horses owned by persons living in five different states (CR-29 CX 3). Twelve of the 13 horses were trained and shown by persons other than their owners. Id. It is frankly incredible that Reinhart now asserts that the HPA does not regulate a (sic) economic activity which affects interstate commerce.

When it enacted the HPA, Congress found that the exhibition of Tennessee Walking Horses substantially affected interstate commerce. 15 U.S.C. § 1822. In particular, Congress found:

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce. Id. In the legislative history of the HPA, Congress observed that Tennessee Walking horses number over 25,000, that champion Tennessee Walking Horses are particularly valuable as studs, and that if a champion is created by soring, that practice may actually weaken the breed's ability to walk in its distinctive fashion. H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 4 (1970), reprinted in 1970 U.S.C.C.A.N. 4870, 4871. The Supreme Court suggested that four questions be raised in deciding a Commerce Clause controversy:

1) Is the prohibited activity commercial or economic in nature?;

2) Is there an express jurisdictional element involving

interstate activity which might limit the statute's reach?;

3) Did Congress make findings about the effects of the prohibited conduct on interstate commerce?; and

4) Is the link between the prohibited activity and the effect on interstate commerce attenuated?

Corp. 236 at 329, citing Morrison, 529 U.S. at 610-623. Here, the prohibited activity - entering a sore horse in a horse show - is a commercial or economic activity. Substantial commerce exists in the selling, purchasing, training, transporting, and exhibiting of Tennessee Walking Horses. Much more than a cheap blue ribbon is involved.[1] *Congress found that entering and exhibiting sore horses results in unfair competition and could ultimately damage the integrity of the breed. Although Congressional findings, standing alone, are not sufficient to sustain the Constitutionality of legislation, Morrison, 529 U.S. at 614, the economic activities engaged in by Reinhart, his wife, and his trainer are solid further evidence that the exhibition of Tennessee Walking Horses is an economic activity of some size. Multiply this by over 25,000 horses, and the economic activity regulated by the HPA is of sufficient magnitude to sustain the constitutionality of this legislation. In addition, the link between entering sore horses in horse shows and the effect on interstate commerce is not attenuated, but rather it is direct and immediate. Unlike in Lopez, where the link between gun possession and interstate commerce was remote, the HPA proscribes entering sore horses in the very exhibitions which are regulated. This statute directly regulates a substantial economic activity (horse shows), and the direct link between soring horses and unfair*

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[1] Most prizes for winning competitors at the Trainers Show are in the $75-$150 range. However, the top prize for the championship event (Class 94) is $1,750.00 (CR-29 CX 1). All prizes in that one event class total $10,000. (*On Petition for Review of an Order of the Secretary, United States Department of Agriculture, Brief for the Respondent,* May 2001, p. 24)

competition at the exhibitions is the basis of the legislation. " (*On Petition For Review of an Order of the Secretary, United States Department of Agriculture, Brief for the Respondent*, May 2001, pp. 21, 22-25)

Analysis - Constitutionality

First, there is agreement that the constitutionality of the Horse Protection Act must be determined under the legal framework of *Lopez* and *Morrison* which require a substantial effects test on interstate commerce of the regulated activity. In this case, the regulated activity is, as plainly stated in the statute, the showing or exhibiting of a sore horse. The record in this case shows that the government advances three arguments:

1. *That the horse show under which this case arose featured 13 horses owned by persons in five different states.* Petitioner argues that interstate participation is completely irrelevant to the substantial effects test of *Lopez* and *Morrison*. Based on the level of interstate participation in this event, which featured over 1,000 entries, every human and animal event in the country could justifiably be regulated under the Commerce Clause. Apparently, the U.S.D.A. here is confusing cases decided by the courts which have properly ruled that interstate carriers and interstate public facilities are subject to federal regulation. There has never been in this record a claim that horses are a means of interstate transportation. Beyond this, in that section of the U.S.D.A. brief cited above the government has agreed that the Horse Protection Act comes under the substantial effects test of *Lopez* and *Morrison.*

2. *That champion Tennessee Walking Horses are valuable as studs and that if a champion is created by soring, this practice may actually weaken the breed's ability to walk in its distinctive fashion.* This bizarre argument places the U. S.

Congress in the role of protector of the integrity of a breed of horses and has nothing to do with the substantial effects test. Beyond this, the plain wording is layer after layer of uninformed speculation and is based on a simplistic understanding of horse breeding.

Under the U.S.D.A.'s argument about horse breeding, in the thoroughbred world the greatest thoroughbred horse in the past 100 years, and perhaps ever, was Secretariat. He was proclaimed by knowledgeable horsemen as the most natural running horse they had ever seen, requiring virtually no training. Despite this, as a stud Secretariat produced no stallions of any consequence and only a few mares which were of modest quality. This statement as a basis for regulation under the Commerce Clause demonstrates the degree to which the U.S.D.A. will attempt to expand its power. Petitioner argues that protecting the integrity of the Tennessee walking horse is the responsibility of owners and breeders of these horses.

3. *Tennessee Walking Horses are an economic activity of some size. Multiply this effect by 25,000 and the economic activity regulated by the H.P.A. is of sufficient magnitude to sustain the constitutionality of this legislation.* First, of the 25,000 Tennessee walking horses cited by the U.S.D.A., only about five percent of these horses are shown or exhibited. Beyond this, the argument about the size of the Tennessee walking horse registry has nothing to do with the substantial effects test. The size of an enterprise is not a triggering mechanism for regulation under the Commerce Clause.

Tennessee walking horse show activity must immediately be distinguished from the economic activity generated by other horse breeds. In thoroughbred and some quarter horse racing, pari-mutual betting is the basis of substantial economic effect, yet, state horse racing commissions, not the Federal government, regulate horse

racing activities, establishing standards for competition. The rules vary in thoroughbred horse racing between states where some states allow certain drugs (i.e., lasix) to be used while in other states the same drug is prohibited. Showing Tennessee walking horses is an activity largely regional in nature and follows the model that exists for all amateur human and animal competitions such as dog shows, amateur golf tournaments, car shows, beauty contests, etc. That is, an entry fee is required for participation and ribbons and cash awards are given to the top performers. In the typical walking horse show, an entry fee of $25.00 is normal and prize money, normally $50.00, is awarded to the top performers.

The overwhelming majority of walking horse shows are sponsored by charitable and civic organizations where the proceeds from concessions are used to support community charitable and civic activities. Approximately 80% of all horses in these shows are shown by amateur riders who own the horses. The motivation for participation in this activity is not a profit motive. The expense of preparing a horse for these competitions - veterinary bills, feed, tack, training, etc. - always exceed any winnings from showing a horse. There has never been an instance where a horse owner has made a profit from prize money in showing a Tennessee walking horse. Exhibiting Tennessee walking horses is a purely recreational activity. In the words of an announcer of the Tennessee Walking Horse National Celebration horse show, showing horses is among the last vestiges of the agrarian society of this country.

The culture of Tennessee walking horse shows is a family-oriented activity. Children as young as five years old exhibit these horses and senior citizens as old as 90 show their horses. The culture of Tennessee walking horse shows is more akin to the culture associated with the exhibition of animals at county fairs and, in fact, many walking horse shows are

held in conjunction with county fairs. It is not substantially different from horse shows in Scotland, Ireland, England and other countries including horse shows in the Arabic world where horses are simply shown for bragging rights and not for money.

In its arguments, the U.S.D.A. exaggerates the economic effect of horse activity under the mistaken notion that this has anything to do with the substantial effects test. At oral argument in the present case, the U.S.D.A. attorney aggregated the total economic effect of all horse breeds, which includes feed, veterinary services, tack, etc., in an attempt to make the court believe this is some gigantic economic enterprise. Tennessee walking horses constitute only a small percentage of the total horse population of the United States. More fundamentally, Petitioner believes that the U.S.D.A. does not understand the substantial effects test. The test is not the size of the economic enterprise within which the regulated activity occurs - in this case horse shows - but, the regulated activity itself - the showing or exhibiting of a sore horse. In summary, none of these arguments by the U.S.D.A. make even a remote connection between the regulated activity - the exhibiting or showing of a sore horse - and this activity's substantial effect on interstate commerce.

The horse shows in question in this case are based on the model for virtually all animal and amateur human athletic events. If this model comes within regulation under the Commerce Clause, then all dog shows, Sunday amateur golf tournaments, car shows, beauty contests, etc., would all be subjected to federal regulation. Congress would simply have to declare, without any basis, that there was some unfair practice occurring in any of these events which adversely affects interstate commerce.

The plain wording of the Horse Protection Act argues that this Act is not about the regulation of interstate

commerce at all. Section 3 (1) states that: *"the soring of horses is cruel and inhumane".* In Section 2 (D), a sore horse is defined as one on which some irritating or blistering agent or some other practice has been performed *". . . .where such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving. . . ."* The findings from a palpation examination by a U.S.D.A. veterinarian is whether he/she believes that the horse would be in pain if the horse were allowed to be shown. The Congressional findings and definitions plainly argue that the Horse Protection Act is a Federal cruelty to animals statute since no connection to interstate commerce is established. Petitioner argues this is what the Act is, but does not believe this is a Federal function.

The H.P.A., passed in 1976, usurped, with identical language, the Tennessee law which was enacted in 1963, (*Tennessee Code Annotated*, Section 39, Chapter 14, Part 2), with one notable exception. That is, the Tennessee law provided for a trial in a court in the independent judicial branch with prosecution by an independent prosecutor. Other states had similar laws. There is no argument in the Congressional Record that Tennessee or other states were improperly enforcing their own laws. In the H.P.A., Congress simply created a Federal offense which was already prohibited by state law. This Court rejected this exercise of Congressional power in both *Lopez* and *Morrison*. The H.P.A. is yet another example of Congress appropriating state police power under the guise of regulating commerce. If this Court can defer to the states to provide a remedy to the rape and other offenses graphically presented in the *Morrison* case, surely it can agree that, under our system, the states can provide a remedy for soring a horse.

<u>Enforcement of the Horse Protection Act Under Existing Methods is a Denial of Equal Protection of the Law Prohibited by the United States Constitution</u> (Article XIV)

The record in this case shows that the present method adopted by the U.S.D.A. for detecting sore horses is the palpation of the pastern area of a horse's foot. In this procedure, one front foot of the horse is picked up and the pastern area is pressed upon with the fingers of the inspector and, if the horse moves its foot in response to this pressure, the horse is deemed to be sore. This palpation examination is conducted by a U.S.D.A. veterinarian and is the evidence used in the prosecution of these cases. This method was adopted by the U.S.D.A. over the objection of the walking horse community in general and specifically, the leading equine veterinarians as represented in the published document, *The Atlanta Protocol.* The U.S.D.A. is so committed to this method for detecting sore horses it gives no weight to the evidence of other methods for detecting a sore horse.

At the administrative hearing Petitioner presented Charles Thomas, the senior member of the National Horse Show Commission[2], as a defense witness. Mr. Thomas testified that he checked Petitioner's horse while the horse was being ridden in its normal gaits with action devices 10 minutes before the palpation examination by the U.S.D.A. veterinarians and concluded that the horse was not sore. The method of checking a horse with action devices while being ridden is considered by knowledgeable horsemen as the most stringent test to determine if a horse exhibits pain or an exaggerated gait due to soreness. The Administrative Law Judge in the following statement from his Decision and Order completely rejects the evidence of Charles Thomas in the following statement:

2The National Horse Show Commission is an industry organization. The staff of the organization checks every horse at every show. The U.S.D.A. checks horses at certain shows selected on a random basis.

"He merely viewed Double Pride Lady but did not palpate her. He, along with Respondent's two other witnesses, was of the opinion that the horse was not sore at the time. This evidence of Respondent fails to rebut the testimony of the two DQPs and two VMOs stationed at the show who found problems with the horse after they had palpated her. " **(Decision and Order, HPA Docket No. 99-0013, June 5, 2000, p. 8)**

In short, the only evidence the U.S.D.A. will accept is based on its adopted method of palpating the horse's pastern area. On Defendants' appeal to the Fifth Circuit Court of Appeals in *Bill Young and Floyd Sherman v. United States Dep't of Agriculture*, 53 F3.d 728 (5th Cir. 1995), the U.S.D.A. was called upon to defend its adopted method. The Court said:

"The reliability of the veterinarians' conclusions recorded in the hearsay documents, based almost exclusively on the results of digital palpation, are also called into question by significant evidence presented at the hearing supporting the conclusion that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse. Several highly qualified expert witnesses for the petitioners testified that soring could not be diagnosed through palpation alone. Petitioners also offered a written protocol signed by a group of prominent veterinarians coming to the same conclusion. The JO's basis for rejecting this evidence seems to be simply that it is contrary to the agency's policies and the agency's prior decisions (2) The JO does not point to scientific or medical data supporting the agency's chosen diagnostic technique. See Veal v. Bowen, 833 F.2d 693, 699 (7th Cir. 1987) (holding that '[w]here diagnoses are not supported by medically acceptable clinical and laboratory diagnostic techniques, this court need not accord such diagnoses great weight')." **(Id. *Young*)**

After the decision of the Fifth Circuit in *Young* in

1995, the present case was instituted against Petitioner in 1998 relying on the exact method and evidence presented in the *Young* case. In his brief, Petitioner presented the decision of the Fifth Circuit in *Young*, which rejected the palpation method as unreliable. The U.S.D.A., in its brief, dismissed that decision and that court as *"a derelict on the waters of the law."* During the course of litigation of the present case, a second case was appealed to the Fifth Circuit and again the U.S.D.A. had to defend its chosen method of palpation in detecting sore horses. The Fifth Circuit said again:

***"In Bill Young and Floyd Sherman v. United States Dep't of Agriculture, 53 F3.d 728 (5th Cir. 1995), we determined that a diagnosis of soreness based solely on digital palpation was not substantial evidence sufficient to support a violation of the Horse Protection Act.... Although counsel for the DOA attempted to distinguish Young, counsel conceded that there was little other evidence in the record besides digital palpation to support the finding of 'soring'. The DOA's determination was thus not supported by 'substantial evidence.'"* (*David Tracy Bradshaw v. U.S. Dep't of Agric.*, 59 Agric. Dec. 228 (2000))**

The Horse Protection Act was passed without jurisdictional limitations. It has nationwide jurisdiction. Thus, the enforcement of this law in the Sixth Circuit Court of Appeals based on exactly the same methods and evidence which have twice been rejected by the Fifth Circuit as not being *"substantial evidence sufficient to support a violation of the Horse Protection Act"* (Id. *Bradshaw*) is a denial of equal protection of the law to Petitioner. This contention is not speculative in light of the following statement by the Sixth Circuit Court in the present case:

"Finally, if it is of any consolation to Reinhart, we would not have been inclined to set aside the Secretary's order even if we had jurisdiction to hear his appeal. The Secretary's

finding that Reinhart violated the HPA appears to be supported by substantial evidence, particularly in light of the fact that this court has specifically held that a finding of soreness for the purposes of the HPA may be based solely upon the results of palpation. Bobo v. U.S. Dep't of Agric., 52 F.3d 1406, 1413 (6th Cir. 1995). . . . . In any event, the merits of his case are not properly before us in light of the untimely appeal." **(Id. *Reinhart*)**

While this is dicta, it shows that the Opinion of this panel of the Sixth Circuit Court of Appeals is in direct conflict with the Fifth Circuit's rulings on palpation as a method for detecting soreness under the Horse Protection Act.

In *Bobo v. United States Department of Agriculture*, 52 F.3d 1406, 1411-13 (6th Cir. 1995), petitioner presented evidence that his horse did not palpate well because of the horse's unruly and fractious nature but did not challenge the method itself. The palpation method has been challenged in the Fourth Circuit and the Sixth Circuit on the argument that the subjective nature of palpation is a denial of due process, *Elliott v. U.S.D.A.*, 990 F.2d 140, 145 (4th Cir. 1993) and *Fleming v. U.S.D.A.*, 713 F.2d 179 (6th Cir. 1983). The arguments in both of these cases was that the amount of pressure applied to the horse's pastern area would vary among different examiners, that is, one examiner could apply more pressure and get a reaction when another examiner could apply less pressure on the same horse and get no reaction. Both the Fourth and Sixth Circuits have held that these arguments were not sufficient and that the subjective nature of palpation does not deny due process (Id. *Elliott* and *Fleming*).

It is clear that there is an inconsistency between the Federal Circuits on whether palpation is substantial evidence to support a violation of the Horse Protection Act. The cases in the Fourth and Sixth Circuits have been on limited

challenges to the method. In *Young*, the Court considered all arguments for and against the palpation method. Petitioners presented expert witnesses who testified that the method was not reliable. Petitioners also presented a written document, The Atlanta Protocol, signed by leading equine veterinarians in the United States, dealing specifically with the method of palpation. This document concluded that palpation alone was not a reliable method. The Fifth Circuit heard arguments from the U.S.D.A. whether the palpation method was supported by any medically acceptable clinical and laboratory diagnostic techniques. The U.S.D.A. could supply no such basis for its method. In the present case, faced with the decisions in the Fifth Circuit and in response to a question from the Sixth Circuit panel, counsel for the U.S.D.A. offered the following: *". . . .palpation is such a well recognized medical technique that to require the department to give some scientific or clinical justification for its use would be analogous to making the department prove that on an uncloudy day the sky is blue."* (From tape of oral argument, *Reinhart v. U.S. Dept. of Agriculture,* June 21, 2002)

The Fifth Circuit Court, in *David Tracy Bradshaw v. U.S. Dep't of Agric.*, 59 Agric. Dec. 228 (2000), again heard all of the above evidence and, in addition, was presented evidence by the petitioner on what is acceptable evidence by expert witnesses in a federal trial.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), the U. S. Supreme Court ruled that the Federal Rules of Practice provide the standard for admitting expert scientific testimony in a federal trial. These Rules, according to the Court, superseded the holding in *Frye v. United States,* 54 App. D.C. 46, 47, 293 F. 1013, 1014, that: *"....expert opinion based on a scientific technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community."*

The Court said further that:

"The trial court is to be guided by Rule 702 of the Federal Rules of Evidence in this regard which provides as follows:

(b) The Rules - especially Rule 702 - place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to "scientific . . . knowledge," since the adjective "scientific" implies a grounding in science's methods and procedures, while the word "knowledge" connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance by demanding a valid scientific connection to the admissibility." Pp. 9-12.

These Rules place an affirmative burden of proof on whether the witnesses testimony is supported by underlying reasoning or scientific methodology. Quoting further from *Daubert:*

"(c) Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquire, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation and whether it has attracted widespread acceptance within a relevant

scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules. " Pp. 12-15. (Id. Daubert). **This holding of the Court in *Daubert* was extended in *Kumho Tire Co., Ltd., et al. v. Carmichael et al.*, No. 97-1709, United States Court of Appeals for the Eleventh Circuit, March 23, 1999, as follows: *"1. The Daubert factors may apply to the testimony of engineers and other experts who are not scientists." Pp. 7-13.***

The *Young* and *Bradshaw* cases deal directly with all of the issues in a fundamental challenge to the palpation method. The Fifth Circuit Court's treatment of the issue is comprehensive and relies on the scientific and clinical underpinning of the method and all applicable federal cases dealing with rules of evidence. Additionally, the Fifth Circuit decided *Young* in 1995 and *Bradshaw* in 2001. The U.S.D.A. had opportunity in both cases to defend its method and it could not. For all of the reasons stated above, the *Young* and *Bradshaw* cases are the most comprehensive and best reasoned cases and should be the basis for this Court resolving the conflict between Federal Districts.

CONCLUSION

For the reasons set forth, the petition for certiorari should be granted.

Respectfully submitted,

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DATE: February 17, 2003

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO._____.

In the Supreme Court of the United States

WILLIAM J. REINHART, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3283

WILLIAM J. REINHART, PETITIONER
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT

ORDER

Filed September 24, 2002

BEFORE: CLAY and GILMAN, Circuit Judges; and HAYNES,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/LEONARD GREEN, CLERK
LEONARD GREEN, CLERK

***Hon. William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.**

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3283

WILLIAM J. REINHART, PETITIONER
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT

Not Recommended for Full-Text Publication. Sixth Circuit Rule 28(g) limits citation to specific situations in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

On appeal from the United States Department of Agriculture

Filed July 10, 2002

OPINION

Before: CLAY and GILMAN, Circuit Judges; HAYNES, District Judge.*

PER CURIAM. William J. Reinhart appeals from an order entered by the Secretary of the United States Department of Agriculture (USDA) that imposes civil penalties against him for violating the Horse Protection Act (HPA). After concluding that Reinhart violated the HPA by "soring" his Tennessee Walking Horse in order to enhance the horse's performance at an exhibition, the Secretary fined Reinhart $2,000 and barred him from participating in any horse exhibition for a period of five years. The Secretary subsequently denied Reinhart's petition for reconsideration of the decision. Reinhart now appeals, contending

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***Hon. William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.**

that the Secretary's decision is not supported by substantial evidence and that the HPA is unconstitutional. For the reasons set forth below, we DISMISS this appeal as untimely filed.

A party has the right to judicial review of a final administrative order imposing civil penalties pursuant to the HPA. 15 U.S.C. § 1825(b)(2). To exercise this right, the party must file a notice of appeal in the United States Court of Appeals for the circuit in which he resides or has his place of business within 30 days from the date on which the final administrative order was issued. *Id.; United States Dep't of Agric. V. Kelly*, 38 F.3d 999, 1002 (8th Cir. 1994) (holding that the time limit for appealing a HPA penalty begins on the date that the final order is issued and docketed).

In the present case, the Secretary issued a final order imposing penalties against Reinhart under the HPA on January 23, 2001, the date on which Reinhart's petition for reconsideration was denied. The 30-day period for filing a notice of appeal therefore began to run on that date. 7 C.F.R. § 1.146(b) (providing that "the time for judicial review shall begin to run upon the filing of such final action on the petition [for rehearing]"). Reinhart filed his notice of appeal with this court on March 23, 2001, nearly 60 days after the final order was issued. His notice of appeal was thus untimely.

The USDA, however, concedes that a clerical error on its part contributed to Reinhart's delay in filing his notice of appeal. Specifically, the USDA's Office of the Hearing Clerk mistakenly sent Reinhart a decision from a totally unrelated case rather than the order denying his petition for reconsideration. The record does not indicate when Reinhart received this decision, but the USDA acknowledges that Reinhart notified it of the mistake and that the decision from his case was then sent out to him on February 15, 2001. Reinhart did not receive this order until February 26, 2001, 34 days after the order was issued and 4 days after the time period for appealing that order had expired.

Despite the equities that might otherwise allow Reinhart to pursue his appeal, a statutory provision that sets the time limit for

seeking review of an administrative order is "mandatory and jurisdictional" and "not subject to equitable tolling." *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995) (internal quotations omitted) (holding that the time period for appealing a deportation order is not tolled by the filing of a motion for reconsideration); Fed. R. App. P. 26(b)(2) (providing that a federal court of appeals "may not extend the time to file. . .a notice of appeal from or a petition to. . .otherwise review an order of an administrative agency. . ."). Such a time limit must be enforced with "strict fidelity" to its terms. *Stone*, 514 U.S. at 405; *Kelly*, 38 F.3d at 1003 (recognizing that the time limit for seeking review of an order imposing penalties pursuant to the HPA "is a jurisdictional requirement that cannot be modified or waived. . ."). An appeal filed beyond the applicable time limit must therefore be dismissed even in the face of apparent injustice or an administrative agency's obvious misapplication or violation of substantive law." *Brown v. Dir., Office of Workers' Com. Programs*, 864 F.2d 120, 124 (11th Cir. 1989) (holding that the time period for filing an appeal of an administrative order under the Black Lung Benefits Act is not subject to equitable tolling).

The only exception that allows this court to enlarge the time limit for filing a notice of appeal is the "unique circumstances" doctrine, a doctrine which applies "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurances by a judicial officer that this act has been properly done." *Osterneck v. Crnst & Whinney*, 489 U.S. 169, 179 (1989) (holding that the unique-circumstances doctrine did not apply where the party that had filed a late notice of appeal never claimed that a judicial officer made any representations regarding the tolling of the applicable time period). Because Reinhart never received any assurance from a judicial officer that the time limit for filing his notice of appeal had been tolled, the unique-circumstances doctrine does not apply to the present case.

Moreover, the mailing error on the part of the USDA does not completely excuse Reinhart's untimely notice of appeal, because [p]arties have an affirmative duty to monitor the dockets

to inform themselves of the entry of orders they may wish to appeal. . . . Therefore, the failure of a court clerk to give notice of entry of an order is not a ground, by itself, to warrant finding an otherwise untimely appeal to be timely.

In re Delaney, 29 F.3d 516, 518 (9th Cir. 1994) (internal quotation marks and citation omitted); *Polylok Corp. v. Manning*, 793 F.2d 1318, 1320 (D.C. Cir. 1986) (holding that the time period for filing an notice of appeal under Rule 4 of the Federal Rules of Appellate Procedure "may not be extended on account of the appellant's lack of notice") (citing Fed. R. Civ. P. 77(d)). Indeed, Reinhart received a decision in the unrelated case that was mailed to him in error well before the period for filing his notice of appeal had expired. His receipt of this decision gave him at least some indication that action might have been taken in his case. Nevertheless, Reinhart neither checked the docket nor called the clerk to see if the Secretary had ruled on his petition for reconsideration.

We therefore must conclude that Reinhart's failure to file a timely notice of appeal prevents us from exercising jurisdiction to resolve this case on the merits. Reinhart maintains, however, that we should vacate the Secretary's order even if we decline to exercise jurisdiction, because the USDA's mailing error allegedly deprived him of due process. He also requests that we award him damages in excess of $100,000 based upon the alleged constitutional violation. But when this court is presented with an untimely notice of appeal, "'the only function remaining to the court is that of announcing the fact and dismissing the case.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (recognizing that a court without jurisdiction lacks authority to issue any judicial decision) (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

We are mindful that, in light of the USDA's mailing error, the dismissal of Reinhart's appeal as untimely appears to be a rather harsh result. Whether equitable considerations should be taken into account when determining the timeliness of a notice of appeal, however, is beyond our power to decide. Only the Supreme Court or Congress can alter the current rule that prohibits

equitable tolling under the circumstances of this case.

Finally, if it is of any consolation to Reinhart, we would not have been inclined to set aside the Secretary's order even if we had jurisdiction to hear his appeal. The Secretary's finding that Reinhart violated the HPA appears to be supported by substantial evidence, particularly in light of the fact that this court has specifically held that a finding of soreness for the purposes of the HPA may be based solely upon the results of palpation. *Bobo v. U.S. Dep't of Agric.*, 52 F.3d 1406, 1413 (6th Cir. 1995). Reinhart also challenges the constitutionality of the HPA, but existing precedent would have left us hard-pressed to conclude that Congress exceeded the scope of its power under the Commerce Clause in enacting the HPA. In any event, the merits of his case are not properly before us in light of the untimely appeal.

Based on all of the above, we DISMISS this appeal for lack of jurisdiction.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3283

WILLIAM J. REINHART, PETITIONER
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT

Filed July 26, 2001

ORDER

William J. Reinhart, a Tennessee resident proceeding pro se, petitions for review of a decision that he violated the Horse Protection Act, 15 U.S.C. §§ 1821-1831.

The parties are hereby order to submit supplemental briefs on the issue whether, in the light of *United States Dep't of Agric. V. Kelly*, 38 F.3d 999, 1001-02 (8th Cir. 1994), this court has jurisdiction over the appeal. *See also* 15 U.S.C. § 1825(b)(2).

The supplemental briefs shall be filed no more than 14 days from the date of this order, and they shall not exceed ten pages in length. This court's July 6, 2001, show cause order is hereby discharged; the question of jurisdiction shall be submitted to the panel.

ENTERED PURSUANT TO RULE 45(a) RULES OF THE SIXTH CIRCUIT Leonard Green, Clerk

/s/LEONARD GREEN

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3283

WILLIAM J. REINHART, PETITIONER
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT

Filed July 6, 2001
ORDER

William J. Reinhart, a Tennessee resident proceeding pro se, petitions for review of a decision that he violated the Horse Protection Act, 15 U.S.C. §§ 1821-1831.

It appears from the documents before the court that the final order of the Secretary of the Department of Agriculture was filed on January 23, 2001, and that Reinhart's petition for review was filed in this court on March 20, 2001. The Horse Protection Act requires a petitioner to file his notice of appeal "within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary." 15 U.S.C. § 1825(b)(2). It appears that Reinhart's notice was filed late. *United States Dep't Agric. V. Kelly*, 38 F.3d 999, 1001-02 (8th Cir. 1994).

It is therefore ordered that Reinhart show cause in writing not later than twenty-one days from the date of this order why appeal No. 01-3283 should not be dismissed for lack of jurisdiction.

It if further ordered that the briefing schedule be held in abeyance pending the resolution of the question of jurisdiction.

ENTERED PURSUANT TO RULE 45(a) RULES OF THE SIXTH CIRCUIT Leonard Green, Clerk
/S/LEONARD GREEN

APPENDIX E

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 99-0013

IN RE:
WILLIAM J. REINHART AND
REINHART STABLES,
RESPONDENTS

Filed June 20, 2001

STAY ORDER

On November 9, 2000, I issued a Decision and Order: (1) concluding that on October 28, 1998, William J. Reinhart, doing business as Reinhart Stables [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831), by entering for the purpose of showing or exhibiting a horse at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore; (2) assessing Respondent a $2,000 civil penalty; and (3) disqualifying Respondent for 5 years from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 13-14, 70-72 (Nov. 9, 2000).

On November 27, 2000, Respondent filed a petition for reconsideration of the November 9, 2000, Decision and Order, which I denied. *In William J. Reinhart,* 60 Agric. Dec.___ (Jan. 23, 2001) (Order Denying William J. Reinhart's Pet. for Recons.).

On May 30, 2001, Respondent filed a letter [hereinafter Motion for Stay] requesting a stay of the Order in *In re William J. Reinhart*, 59 Agric. Dec.___ (Nov. 9, 2000), pending the outcome of the proceedings for judicial review. The Administrator, Animal and Plant Health Inspection Service, United States Department of

Agriculture [hereinafter Complainant], failed to file a timely response to Respondent's Motion for Stay. On June 20, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay.

Respondent filed a petition for review of *In re William J. Reinhart,* 59 Agric. Dec.___ (Nov. 9, 2000), with the United States Court of Appeals for the Sixth Circuit. *Reinhart v. United States Dep't of Agric.*, No. 01-3283 (6th Cir. Mar. 20, 2001). In accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted. The Order issued in *In re William J. Reinhart*, 59 Agric. Dec.___ (Nov. 9, 2000), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

Done at Washington, DC
June 20, 2001

/s/William G. Jenson
William G. Jenson
Judicial Officer

APPENDIX F

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 99-0013

IN RE:
WILLIAM J. REINHART AND
REINHART STABLES,
RESPONDENTS

Filed January 23, 2001

Order Denying William J. Reinhart's Petition for Reconsideration

Procedural History

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on March 10, 1999. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. Complainant alleges that on October 28, 1998, William J. Reinhart [hereinafter Respondent Reinhart] allowed the entry of a horse called "Double Pride Lady" as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ 3).

On April 2, 1999, Respondent Reinhart filed a Response to the Complaint. In his Response, Respondent Reinhart admits he is the owner of Double Pride Lady and admits he allowed the entry of Double Pride Lady at the National Walking Horse Trainers

Show in Shelbyville, Tennessee. However, Respondent Reinhart denies Double Pride Lady was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), when he allowed the entry of Double Pride Lady at the National Walking Horse Trainers Show in Shelbyville, Tennessee. (Response.)

On June 28, 1999, Complainant filed a Motion to Amend Complaint and an Amended Complaint. Complainant moved to amend the Complaint to add Reinhart Stables as a respondent (Motion to Amend Compl. ¶2). On August 5, 1999, Respondent Reinhart filed an untitled document in which he opposed Complainant's Motion to Amend Complaint. On August 24, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALF] granted Complainant's Motion to Amend Complaint to be Respondent Reinhart's and Reinhart Stables' [hereinafter Respondents] Answer to the Amended Complaint (Order Granting Complainant's Motion to Amend Complaint).[1]

The Amended Complaint alleges that on October 28, 1998, Respondents entered and allowed the entry of Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore, in violation of section 5(2)(B) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(B), (D)) (Amended Compl. ¶ 6).

The ALJ presided at a hearing in Nashville, Tennessee, on October 13 and 14, 1999. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent Reinhart represented Reinhart Stables and himself.

On December 10, 1999, Respondents filed a Post-Hearing Brief. On December 27, 1999, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law and Memorandum of Point and Authorities in Support Thereof [hereinafter Complainant's Post-Hearing Brief]. On January 10, 2000, Complainant filed Complainant's Reply to Respondents' Post-Hearing Brief. On January 27, 2000, Respondents filed a

Motion for Dismissal and Reply Brief of Respondent.

On June 5, 2000, the ALJ issued an Initial Decision and Order in which the ALJ: (1) concluded that on October 28, 1998, Respondent Reinhart, acting as an owner of Reinhart Stables, violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore; (2) concluded that Reinhart Stables is merely a name under which Respondent Reinhart does business; (3) assess Respondent Reinhart a $2,000 civil penalty; and (4) disqualified Respondent Reinhart for 5 years from exhibiting, showing, or entering any horse directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 4, 13-14).

On July 6, 2000, Respondents appealed to the Judicial Officer. On September 5, 2000, Complainant filed Complainant's Response to Respondents' Appeal of Decision and Order and Complainant's Appeal of Decision and Order. On September 27, 2000, Respondents filed Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order[2] and Respondent's Response to Complainant's Appeal of Decision and Order.

On October 2, 2000, Respondents filed a motion requesting a list of citations and a motion requesting a transcript of the hearing. On November 1, 2000, Complainant filed responses to Respondents' motion requesting a list of citations and Respondents' motion requesting a transcript of the hearing. On November 3, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision, a ruling on Respondents' motion requesting a list of citations, and a ruling on Respondents' motion requesting a transcript of the hearing.

On November 9, 2000, I issued a Decision and Order: (1) concluding that on October 28, 1998, Respondent Reinhart, doing

business as Reinhart Stables, violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore; (2) concluding that Reinhart Stables is merely a name under which Respondent Reinhart does business; (3) assessing Respondent Reinhart a $2,000 civil penalty; (4) disqualifying Respondent Reinhart for 5 years from exhibiting, showing, or entering any horse directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction; (5) denying Respondents' motion requesting a list of citations; and (6) denying Respondents' motion requesting a transcript of the hearing. *In re William J. Reinhart*, 59 Agric. Dec ___, slip op. at 13-14, 66-68, 70-72 (Nov. 9, 2000).

On November 27, 2000, Respondent Reinhart filed a Petition for Reconsideration of Decision and Order by Judicial Officer [hereinafter Petition for Reconsideration]. On January 2, 2001, Complainant filed Complainant's Response to William J. Reinhart's Petition for Reconsideration. On January 4, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the November 9, 2000, Decision and Order.

Complainant's exhibits are designated by "CX"; Respondents' exhibits are designated by "RX"; and transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15 - COMMERCE AND TRADE

. . .

CHAPTER 44 - PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that -

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person or any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse of a person has engaged in a practice involving a horse,

and as a result of such application, infliction, injection use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that -

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, were such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or

substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit

by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1824(2), 1825(b)(1)-(2), (c), 1828.

9 C.F.R.:

TITLE 9 - ANIMALS AND ANIMAL PRODUCTS

CHAPTER I - ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A - ANIMAL WELFARE

. . . .

PART 11 - HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected by definition in a standard dictionary, such as "Webster's."

. . . .

Inspection **means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.**

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Reinhart raises 24 issues in his Petition for Reconsideration. First, Respondent Reinhart contends the administrative proceeding deprives him of property in violation of the due process clause of the Constitution of the United States (Pet. For Recons. At 1, 19-20).

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of property without due process of law. I have reviewed the record in this proceeding. I find Respondent Reinhart was provided notice and an opportunity for a hearing and all the process Respondent Reinhart was due under the due process clause of the Fifth Amendment to the Constitution of the United States. Therefore, Respondent Reinhart was not deprived of property without due process of law.

Second, Respondent Reinhart contends "[t]he only legitimate function. . .that an administrative law tribunal has in cases where taking of property is involved is the accumulation of facts which may be presented to a court of competent jurisdiction as a basis for a determination of law on the taking of property by government action." (Pet. For Recons. At 2.)

The Horse Protection Act provides that the Secretary of Agriculture may assess a civil penalty against any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824) and may disqualify a person who has been assessed a civil penalty from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The alleged violator must be given notice and an opportunity for a hearing before the Secretary of Agriculture. 15 U.S.C. § 1825(b), (c). Administrative proceedings under the Horse Protection Act are conducted in accordance with the Administrative Procedure Act which imposes a number of procedural requirements. One of these requirements is that, after the alleged violator is provided with an opportunity for an agency

hearing, the agency must issue a decision which includes findings of fact, conclusions of law, and the reasons or basis for the findings of fact and conclusions of law, as follows:

> § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; content of decisions; record
>
> . . . .
>
> (c) . . . .
>
> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -
>
> (A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

Therefore, I disagree with Respondent Reinhart's contention that the only legitimate function of the United States Department of Agriculture in proceedings under the Horse Protection Act is "the accumulation of facts which may be presented to a court of competent jurisdiction as a basis for a determination of law on the taking of property by government action."

Third, Respondent Reinhart contends the ALJ and the Judicial Officer exhibited extreme bias by their failures to find facts concerning Charles L. Thomas' background, Charles L. Thomas' examination of Double Pride Lady, and Charles L. Thomas' determination that Double Pride Lady was not sore (Pet. For Recons. at 2-3).

Due process requires an impartial tribunal, and a biased decisionmaker unfairly deprives the litigant of this impartiality.[3] However, a substantial showing of legal bias is required to disqualify an administrative law judge or judicial officer or to obtain a ruling that the hearing is unfair.[4] Even if I found that the ALJ and I erroneously failed to find facts concerning Charles L.

Thomas' background, Charles L. Thomas' examination of Double Pride Lady, and Charles L. Thomas' determination that Double Pride Lady was not sore, that finding alone would not cause me to conclude that the ALJ and I are biased against Respondent Reinhart.

Fourth, Respondent Reinhart contends the Judicial Officer erroneously found that Charles L. Thomas formed no opinion regarding whether Double Pride Lady was sore (Pet. For Recons. at 3-5). Respondent Reinhart cites page 130 of the transcript and the ALJ's Initial Decision and Order as support for his assertion that Charles L. Thomas was of the opinion that Double Pride Lady was not sore (Pet. For Recons. at 4-5).

I have reviewed page 130 of the transcript and cannot find any testimony which supports Respondent Reinhart's assertion that Charles L. Thomas was of the opinion that Double Pride Lady was not sore. Moreover, the ALJ does not cite the basis for his statement that Charles L. Thomas "was of the opinion that [Double Pride Lady] was not sore" (Initial Decision and Order at 8).

While it is possible to infer from some of Charles L. Thomas' testimony that he was of the opinion that double Pride Lady was not sore (Tr. 127-36, 151), such an inference would be contrary to Charles L. Thomas' testimony in which he specifically addressed the issue regarding whether he formed such an opinion. Specifically, Charles L. Thomas testified that: he observed Double Pride Lady on October 28, 1998 but did not examine Double Pride Lady to determine whether she was sore under the Horse Protection Act; he formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act; and he could not state whether Double Pride Lady was sore under the Horse Protection Act (Tr. 138, 145-50). Therefore, I disagree with Respondent Reinhart's contention that my finding that Charles L. Thomas formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act, is error.

Fifth, Respondent Reinhart asserts the Judicial Officer's statement that Charles L. Thomas formed no opinion regarding whether Double Pride Lady was sore when she was entered in the

National Walking Horse Trainers Show demonstrates the Judicial Officer's great confusion. Respondent Reinhart states Double Pride Lady was entered 2 weeks before the National Walking Horse Trainers Show, and Charles L. Thomas did not see Double Pride Lady 2 weeks before the National Walking Horse Trainers Show. (Pet. For Recons. at 4.)

I agree with Respondent Reinhart that there is no evidence that Charles L. Thomas observed Double Pride Lady 2 weeks prior to the National Walking Horse Trainers Show. However, I disagree with Respondent Reinhart's assertion that I found that Charles L. Thomas observed Double Pride Lady 2 weeks prior to the National Walking Horse Trainers Show.

It is well settled that "entry" within the meaning of the Horse Protection Act is a process, not an event. The process of "entry" includes all activities required to be completed before a horse can be shown or exhibited. The process generally begins with the payment of the fee to enter a horse in a horse show and includes pre-show examination of the horse by Designated Qualified Persons or United States Department of Agriculture veterinarians or both.[5] The evidence establishes that Charles L. Thomas observed Double Pride Lady on October 28, 1998, just before Double Pride Lady's pre-show examination by two Designated Qualified Persons and two United States Department of Agriculture veterinarians (Tr. 140-49, 159-66). Thus, Charles L. Thomas observed Double Pride Lady when she was entered at the National Walking Horse Trainers Show. Charles L. Thomas testified that, when he observed Double Pride Lady, he formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act (Tr. 145-50).

Sixth, Respondent Reinhart contends the Judicial Officer arbitrarily and capriciously found that Complainant's Post-Hearing Brief was time filed (Pet. For Recons. at 5-6).

I disagree with Respondent Reinhart's contention that I arbitrarily and capriciously found that Complainant's Post-Hearing Brief was timely filed. Respondents raised this same issue in Respondents' Petition for Review [hereinafter Respondents'

Appeal Petition] (Respondents' Appeal Pet. at 3). My reasons for finding that Complainant's Post-Hearing Brief was timely filed are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 26-28 (Nov. 9, 2000).

Seventh, Respondent Reinhart contends the Judicial Officer arbitrarily and capriciously found that Respondent Reinhart's response to a motion to lift stay filed in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), was late-filed (Pet. For Recons. at 6).

I did find that Jack Stepp and William Reinhart failed to file a timely response to a motion to lift stay in *In re Jack Stepp*, 59 Agric. Dec.___ (Apr. 26, 2000) (Order Lifting Stay). However, my finding that Jack Stepp and William Reinhart failed to file a timely response to a motion to lift stay in a prior proceeding is not relevant to this proceeding.

Respondent Reinhart alleges "[a] pattern of discriminatory rulings against [him] on filing deadlines in prior proceedings" and contends that this pattern "is sufficient evidence as part of an overall argument that [he] was not provided a fair trial in a fair tribunal" (Pet. for Recons. at 6).

I disagree with Respondent Reinhart's contention that there is a pattern of discriminatory rulings against him regarding filing deadlines in prior proceedings. Moreover, purported discriminatory rulings against Respondent Reinhart in prior proceedings are not relevant to this proceeding.

Respondents raised the issue of the disparate application of section 1.147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) (which concerns the effective date of filing in administrative proceedings instituted under the Rules of Practice) in Respondents' Appeal Petition (Respondents' Appeal Pet. at 3-5). My reasons for rejecting Respondents' contention that 7 C.F.R. § 1.147(g) was disparately applied to the litigants in this proceeding and in *In re*

Jack Stepp, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 28-32 (Nov. 9, 2000).

Eighth, Respondent Reinhart contends the Judicial Officer completely misunderstands *Carroll v. C.I.R.*, 71 F.3d 1228 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). Respondent Reinhart asserts "the Judicial Officer believes the *Carroll* case imposes the common law mailbox rule to any filings with any federal court." Further, Respondent Reinhart asserts *Carroll* held "the mailbox rule generally applies to all federal circuits but specifically in the Sixth Circuit, the filing must be by certified mail as opposed to general delivery." (Pet. for Recons. at 6.)

As an initial matter, I did not state in the November 9, 2000, Decision and Order that *Carroll* "imposes the common law mailbox rule to any filings with any federal court," as Respondent Reinhart contends. Moreover, as fully discussed in the November 9, 2000, Decision and Order, *Carroll* is not applicable to this administrative proceeding. *In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 32-33 (Nov. 9, 2000).

Ninth, Respondent Reinhart asserts the record contains overwhelming evidence that digital palpation is not a reliable method by which to determine whether a horse is "sore" as defined in the Horse Protect Act (Pet. for Recons. at 7).

Respondent Reinhart does not cite any part of the record to support his assertion that the record contains overwhelming evidence that digital palpation is not a reliable method by which to determine whether a horse is sore. Moreover, I cannot locate evidence that supports Respondent Reinhart's assertion. Therefore, I reject Respondent Reinhart's assertion that the record contains overwhelming evidence that digital palpation is not a reliable method by which to determine whether a horse is "sore" as defined in the Horse Protection Act.

Tenth, Respondent Reinhart asserts Dr. Slauter and Dr. Smith testified that they could cite no scientific or clinical evidence that palpation is a reliable method for detecting sore horses (Pet. for Recons. at 7).

Respondent Reinhart does not refer to any part of the transcript to support his assertion that Dr. Slauter and Dr. Smith testified that they could not cite scientific or clinical evidence that palpation is a reliable method for detecting sore horses. I find no testimony by Dr. Smith that he cannot cite scientific or clinical evidence that palpation is a reliable method for detecting sore horses. Moreover, I find no testimony by Dr. Slauter that he cannot cite clinical evidence that palpation is a reliable method for detecting sore horses. However, Dr. Slauter does indicate that he cannot cite scientific evidence of the connection between a horse's reaction to digital palpation and soring of that horse (Tr. 63). Both Dr. Slauter and Dr. Smith testified that digital palpation is a reliable method by which to detect sore horses under the Horse Protection Act (Tr. 29-30, 106-09). Therefore, ever if Drs. Slauter and Smith had testified as Respondent Reinhart asserts, such testimony would not change the disposition of this proceeding.

Eleventh, Respondent Reinhart contends the ALJ erroneously excluded the Atlanta Protocol (RX 1) (Pet. for Recons. at 7). I disagree with Respondent Reinhart's contention that the ALJ erroneously excluded the Atlanta Protocol. Respondents raised the issue of the ALJ's exclusion of the Atlanta Protocol in Respondents' Appeal Petition (Respondents' Appeal Pet. at 5-9). My reasons for concluding that the ALJ properly excluded the Atlanta Protocol (RX 1) are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 33-40 (Nov. 9, 2000).

Respondent Reinhart also contends the Atlanta Protocol (RX 1) was admitted in a previous proceeding, *In re Bill Young*, 53 Agric. Dec. 1232 (1994), "even thought the authors of that document were not present to testify (Pet. for Recons. at 7 n.1). However, a review of *In re Bill Young*, 53 Agric. Dec. 1232 (1994), *rev'd*, 53 F.3d 728 (5th Cir. 1995), reveals that two of the authors of the Atlanta Protocol, Dr. Proctor and Dr. Miller, testified in the

administrative proceeding.

Twelfth, Respondent Reinhart contends the United States Department of Agriculture has a "vested and biased interest in its reliance of digital palpation as they only procedure for detecting sore horses" (Pet. for Recons. at 8-11).

I disagree with Respondent Reinhart's contention that the United States Department of Agriculture has a "vested and biased interest in its reliance on digital palpation as the only procedure for detecting sore horses." The record does not reveal that the United States Department of Agriculture has a "vested and biased interest" in relying on palpation as the sole method to determine whether a horse is sore under the Horse Protection Act.

The Horse Protection Regulations (9 C.F.R. pt. 11) defines the term "inspection" as the examination of a horse by whatever means are deemed appropriate and necessary to determine compliance with the Horse Protection Act and the Horse Protection Regulations. The definition of the term "inspection" identifies a number of methods by which a horse may be inspected to determine whether the horse is "sore" as defined in the Horse Protection Act. 9 C.F.R. § 11.1. This definition of the term "inspection" for the purpose of determining compliance with the Horse Protection Act and the Horse Protection Regulations clearly establishes that the United States Department of Agriculture does not rely on palpation as the sole means by which to determine whether a horse is sore under the Horse Protection Act.

Moreover, Dr. Slauter and Dr. Smith did not limit their inspection of Double Pride Lady to palpation. Drs. Slauter and Smith observed Double Pride Lady's movement and, in part, based their determinations that Double Pride Lady was sore on their observations of her movement (CX 9, CX 10; Tr. 46, 109-09).

Thirteenth, Respondent Reinhart contends Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady were not in compliance with the Horse Protection Act because the examinations were conducted while Double Pride Lady was standing still (Pet. for Recons. at 11-12).

I disagree with Respondent Reinhart's contention that Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady were not in compliance with the Horse Protection Act because the examinations were conducted while Double Pride Lady was standing still. Respondents raised the issue of Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady in Respondents' Appeal Petition (Respondents' Appeal Pet. at 8). My reasons for rejecting Respondents' contention that Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady did not comply with the Horse Protection Act are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 40-44 (Nov. 9, 2000).

Fourteenth, Respondent Reinhart asserts that when Drs. Slauter and Smith palpated Double Pride Lady, they observed Double Pride Lady's "conditioned reflex" to training, which had been activated by Charles L. Thomas' examination, not a reaction to pain (Pet. for Recons. at 12).

Respondents presented no evidence to support the claim that Double Pride Lady's response to digital palpation by Drs. Slauter and Smith was a "conditioned reflex" to training activated by Charles L. Thomas' examination. Moreover, Respondent Reinhart raises this argument for the first time in his Petition for Reconsideration. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[6] Respondent Reinhart has raised the issue of Double Pride Lady's "conditioned reflex" too late for me to consider the issue.

Even if I found that Respondent Reinhart had timely raised the issue of Double Pride Lady's "conditioned reflex," I would reject the argument because Dr. Slauter and Dr. Smith testified that they can distinguish a horse's response to pain from a horse's response to some other condition (Tr. 22-24, 29-30, 98-99). Moreover, Respondent Reinhart's theory of Double Pride Lady's "conditioned reflex" does not explain Double Pride Lady's poor locomotion (CX 9, CX 10; Tr. 46, 108-09).

Fifteenth(sic), Respondent Reinhart contends he did not violate the Horse Protection Act because he did not present Double

Pride Lady "in a cruel or inhumane condition" (Pet. for Recons. at 12-14).

Section 3 of the Horse Protection Act sets forth congressional findings (15 U.S.C. § 1822). One of these congressional findings is that the act of soring horses is cruel and inhumane (15 U.S.C. § 1822(1)). However, a finding that a respondent "presented" a horse in a "cruel or inhumane condition" is not a prerequisite to the conclusion that the respondent has violated the Horse Protection Act. Complainant proved by a preponderance of the evidence[7] that Respondent Reinhart entered Double Pride Lady for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore, which is all that is necessary for a conclusion that Respondent Reinhart violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824 (2)(B)). Therefore, I reject Respondent Reinhart's contention that he did not violate the Horse Protection Act because he did not present Double Pride Lady in a "cruel and inhumane condition."

Sixteenth, Respondent Reinhart contends the Horse Protection Act is an unconstitutional exercise of power under the Commerce Clause of the Constitution of the United States (Pet. for Recons. at 12-15).

I disagree with Respondent Reinhart's contention that the Horse Protection Act is an unconstitutional regulation of intrastate commerce. Respondents raised this same issue regarding the constitutionality of the Horse Protection Act in Respondents' Appeal Petition (Respondents' Appeal Pet. at 16-27). My reasons for concluding that the Horse Protection Act is not an unconstitutional regulation of intrastate commerce are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 20-22 (Nov. 9, 2000).

Seventeenth, Respondent Reinhart contends the conclusion that he violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) is error because Complainant failed to prove that Double Pride Lady's performance would have been improved

by soring (Pet. for Recons. at 14).

Section 3 of the Horse Protection Act sets forth congressional findings (15 U.S.C. § 1822). One of these congressional findings is that "horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore" (15 U.S.C. § 1822(2)). However, a finding that soring improved or would have improved a respondent's horse's performance is not a prerequisite to the conclusion that the respondent has violated the Horse Protection Act. Complainant proved by a preponderance of the evidence[8] that Respondent Reinhart entered Double Pride Lady for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore, which is all that is necessary to prove that Respondent Reinhart violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Therefore, I reject Respondent Reinhart's contention that the conclusion that he violated the Horse Protection Act is error because Complainant failed to prove that soring improved or would have improved Double Pride Lady's performance.

Eighteenth, Respondent Reinhart contends "the Judicial Officer states the ludicrous proposition that Drs. Slauter and Smith are more credible witnesses than Charles Thomas" (Pet. for Recons. at 15-16).

Respondent Reinhart does not cite any part of the November 9, 2000, Decision and Order in which I state that Drs. Slauter and Smith are more credible witnesses than Charles L. Thomas. Moreover, I cannot locate any part of the November 9, 2000, Decision and Order in which I state that Drs. Slauter and Smith are more credible than Charles L. Thomas. I found Drs. Slauter and Smith to be credible witnesses, but I also found Charles L. Thomas was a credible witness. *In re William J. Reinhart,* 59 Agric. Dec.___, slip op. at 12-13, 44 (Nov. 9, 2000).

Nineteenth, Respondent Reinhart contends *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), is controlling (Pet.

for Recons. at 15-16).

I disagree with Respondent Reinhart's contention that *Young* is controlling. Respondents contended that *Young* is controlling in Respondents' Appeal Petition (Respondents' Appeal Pet. at 6, 8-9). My reasons for rejecting Respondents' contention that *Young* is controlling are set forth in the November 9, 2000, Decision and Order. *In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 37-40 (Nov. 9, 2000).

Twentieth, Respondent Reinhart contends the United States Court of Appeals for the Fifth Circuit held in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), that palpation as a method for detecting sore horses is not reliable, that palpation as a method for detecting sore horses is illegal, and that 9 C.F.R. pt. 11 is illegal (Pet. for Recons. at 16).

A review of *Young* reveals that the United States Court of Appeals for the Fifth Circuit did not hold that digital palpation is illegal or that 9 C.F.R. pt. 11 is illegal, as Respondent Reinhart contends. However, the Court does state that there was significant evidence presented at the administrative hearing that "an observed reaction to digital palpation alone is not a reliable indicator of a sore horse." *Young*, 53 F.3d at 731.

None of the litigants in this proceeding presented significant evidence that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse. Moreover, Dr. Slauter and Dr. Smith based their determinations that Double Pride Lady was sore not only on Double Pride Lady's reaction to palpation, but also on their observations of Double Pride Lady's movement (CX 9, CX 10; Tr. 46, 108-09).

Twenty-first, Respondent Reinhart contends that, since the United States Court of Appeals for the Fifth Circuit decided *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), the Secretary of Agriculture has not enforced the Horse Protection Act within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. Respondent Reinhart contends that because he

resides within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the Secretary of Agriculture's selective enforcement of the Horse Protection Act and 9 C.F.R. pt. 11 denies him equal protection of the law. (Pet. for Recons. at 16-17.)

Respondent Reinhart cites no basis for his contention that since the United States Court of Appeals for the Fifth Circuit decided *Young* on June 7, 1995, the Secretary of Agriculture has not enforced the Horse Protection Act within the jurisdiction of the United States Court of Appeals for the Fifth Circuit (Louisiana, Mississippi, and Texas). I cannot locate any evidence that support Respondent Reinhart's contention. Complainant states Respondent Reinhart's contention that the Secretary of Agriculture has not enforced the Horse Protection Act in Louisiana, Mississippi, and Texas since June 7, 1995, is false (Complainant's Response to Respondent William J. Reinhart's Petition for Reconsideration at 22). Moreover, since June 7, 1995, I have issued decisions in three proceedings under the Horse Protection Act in which the respondents could appeal to the United States Court of Appeals for the Fifth Circuit.[9] In two of these three proceedings, the horses found to e sore had been entered in horse shows conducted within the jurisdiction of the United States Court of Appeals for the Fifth Circuit.[10] Therefore, I reject Respondent Reinhart's contention that the Secretary of Agriculture has not enforced the Horse Protection Act in Louisiana, Mississippi, and Texas since June 7, 1995.

Twenty-second, Respondent Reinhart contends the United States Department of Agriculture has misstated the position of the United States Court of Appeals for the Sixth Circuit "which has only ruled that, evidence of soreness based on palpation is sufficient to invoke the presumption of soreness" and which "has specifically stated that evidence that can overcome this presumption is permissible and will be considered" (Pet. for Recons. at 17 (emphasis in original)).

The United States Court of Appeals for the Sixth Circuit has held that "a finding of 'soreness' based upon the results of digital palpation alone is sufficient to invoke the rebuttable presumption"

that a horse is sore. *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1413 (6th Cir. 1995). In the November 9, 2000, Decision and Order, I cited *Bobo* stating the Sixth Circuit has held that a horse's reaction to digital palpation alone is sufficient to invoke the presumption that the horse is sore. *In re William J. Reinhart,* 59 Agric. Dec.___, slip op. at 16, 37 (Nov. 9, 2000). In my view, the November 9, 2000, Decision and Order accurately describes the Sixth Circuit's holding in *Bobo*. Therefore, I reject Respondent Reinhart's contention that the United States Department of Agriculture has misstated the position of the United States Court of Appeals for the Sixth Circuit.

Twenty-third, Respondent Reinhart contends the Secretary of Agriculture through the adoption of 9 C.F.R. pt. 11 has "completely changed the Horse Protection Act from an effort by the Congress to regulate interstate commerce to an effort by the [United States Department of Agriculture] to illegally assume responsibility for the enforcement of a federal law relating to cruelty to animals." Respondent Reinhart asserts that 9 C.F.R. pt. 11 violates the Commerce Clause of the Constitution of the United States (Pet. for Recons. at 17).

The Secretary of Agriculture is authorized to issue such regulations as the Secretary deems necessary to carry out the Horse Protection Act (15 U.S.C. § 1828). I have reviewed 9 C.F.R. pt. 11. I conclude that all of the regulations in 9 C.F.R. pt. 11 are designed to carry out the Horse Protection Act and none of the regulations are beyond the authority granted to the Secretary of Agriculture under the Horse Protection Act. Moreover, 9 C.F.R. pt. 11 does not violate the Commerce Clause of the Constitution of the United States, as Respondent Reinhart asserts.

Twenty-fourth, Respondent Reinhart requests that I either dismiss the proceeding or refer the proceeding to a district court of the United States or to the United States Court of Appeals for the Sixth Circuit (Pet. for Recons. at 21).

Complainant proved by a preponderance of the evidence[11] that on October 28, 1998, Respondent Reinhart violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by

entering for the purpose of showing or exhibiting the horse known as "Double Pride Lady" as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore. Therefore, I find no basis for dismissing this proceeding, as Respondent Reinhart requests.

Moreover, the Judicial Officer has no authority under the Rules of Practice to refer a proceeding to a district court of the United States or to the United States Court of Appeals for the Sixth Circuit.[12] Therefore, I deny Respondent Reinhart's request that I refer this proceeding to a district court of the United States or to the United States Court of Appeals for the Sixth Circuit.

For the foregoing reasons and the reasons set forth in *In re William J. Reinhart*, 59 Agric. Dec.___ (Nov. 9, 2000), Respondent Reinhart's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1,146(B)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[13] Respondent Reinhart's Petition for Reconsideration was timely filed and automatically stayed the November 9, 2000, Decision and Order. Therefore, since Respondent Reinhart's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed November 9, 2000, is reinstated: except that (1) the date within which payment of the civil penalty was required to be forwarded to and received by Ms. Carroll in paragraph 1 of the November 9, 2000, Order; (2) the effective date in paragraph 2 of the November 9, 2000, Order; and (3) and the date of the Order in paragraph 3 of the November 9, 2000, Order, are the dates indicated in paragraphs 1, 2, and 3 of the Order in this Order Denying William J. Reinhart's Petition for Reconsideration.

For the foregoing reasons, the following Order should be issued.

Order

1. William J. Reinhart is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343 South Building
Washington, DC 20250-1417

William J. Reinhart's payment of the civil penalty shall be forwarded to, and received by, Mr. Carroll within 60 days after service of this Order on William J. Reinhart. William J. Reinhart shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0013.

2. William J. Reinhart is disqualified for a period of 5 years from showing, exhibiting, or entering any horse directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

This 5-year period of disqualification is to be served consecutive to the disqualification of William J. Reinhart ordered in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). The disqualification shall become effective on the 60th day after service of this Order on William J. Reinhart.

3. William J. Reinhart has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which William J. Reinhart resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. William J. Reinhart must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is January 23, 2001.

Done at Washington, DC
January 23, 2001
/s/William G. Jenson
William G. Jenson
Judicial Officer

FOOTNOTES - APPENDIX F

1. The ALJ also amended the caption of the proceeding which had previously been "*In re William J. Reinhart*" to read *In re William J. Reinhart, an individual, and Reinhart Stables, an unincorporated association or sole proprietorship* (Order Granting Complainant's Motion to Amend Complaint). The ALJ appears to have abandoned the caption in his Order Granting Complainant's Motion to Amend Complaint, and I have retained the caption adopted by the ALJ in his June 5, 2000, Decision and Order [hereinafter Initial Decision and Order].

2. The Rules of Practice do not provide for a litigant's filing a response to a response to an appeal petition. However, a litigant may file, and I may grant, a motion requesting the opportunity to file a response to a response to an appeal petition. Respondents did not file a motion requesting the opportunity to file a response to Complainant's Response to Respondents' Appeal of Decision and Order. Therefore, I have not considered Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order.

3. Withrow v. Larkin, 421 U.S. 35, 46-47 (1975) (stating a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (stating any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998) (stating due process guarantees a hearing concerning the deprivation of life or a recognized property or liberty interest before a fair and impartial tribunal and this guarantee applies to administrative adjudications as well as those in the court), *cert. denied*, 525 U.S. 1068 (1999); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating essential to a fair administrative hearing is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843

(D.C. Cir. 1976) (stating a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating quasi-judicial proceedings entail a fair trial and fairness requires an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating it is the essence of a valid judgment that the body that pronounces judgment in a judicial or quasi-judicial proceeding be unbiased); *Inland Steel Co. V. NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (stating trial by a biased judge is not in conformity with due process and the recognition of this principle is an essential in proceedings before administrative agencies as it is before the courts).

4. Harline v. DEA, 148 F.3d 1199, 1203 (10th Cir. 1998) (stating an administrative law judge enjoys a presumption of honesty and integrity which is only rebutted by a showing of some substantial countervailing reason to conclude that the administrative law judge is actually biased with respect to factual issues being adjudicated), *cert. denied*, 525 U.S. 1068 (1999); *Akin v. Office of Thrift Supervision*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a reasonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judge's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1989) (stating a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating in order to maintain a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 f.2d 158, 164 (10TH Cir. 1976) (stating a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling

that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

5. In re Jack Stepp, 57 Agric. Dec. 297, 309 (1998) (stating "entering" within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and includes pre-show examination by the Designated Qualified Person or the United States Department of Agriculture veterinarian or both), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Danny Burks*, 53 Agric. Dec. 322, 334 (1994) (rejecting the respondent's argument that "the mere act of submitting a horse for pre-show inspection does not constitute 'entering' as that term is [used in the Horse Protection] Act"); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 280 (1994) (rejecting the respondent's argument that "entering," as used in the Horse Protection Act, is limited to "doing whatever is specifically required by the management of any particular horse show to cause a horse to become listed on the class sheet for a specific class of that horse show"), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 293 (1993) (stating "entering" a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1183 (1193) (stating entry is a process that gives a status of being entered to a horse and entry includes filling out forms and presenting the horse to the Designated Qualified person for inspection); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1146-47 (1993) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (1993) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and includes pre-show examination by the Designated Qualified Person or the United States Department of Agriculture veterinarians or both), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

6*In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding), 59 Agric. Dec.___, slip op. at 46 (Jan. 4, 2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 719, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 373-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*,

112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Consesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 861 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 308, 309-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

7The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of proof is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re David Tracy Bradshaw*, 59 Agric. Dec.___, slip op. at 10-11 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892-903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Bechnell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C. M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1994); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re*

Jackie McConnell (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162762 (5th Cir. 1994), *printed in* 53 Agric. Dec. 175 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

8See note 7.

9*In re David Tracy Bradshaw*, 59 Agric. Dec.___ (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Stephen Douglas Bolton* (Decision as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997).

10*In re Stephen Douglas Bolton* (Decision as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999); *In re Gerald Funches*, 56 Agric. 517 (1997)

11See note 7.

12*In re William J. Reinhart*, 59 Agric. Dec.___, slip op. at 65 (Nov. 9, 2000); *In re Jack Stepp*, 59 Agric. Dec.___, slip op. at 4 (Apr. 26, 2000) (Order Lifting Stay); *In re Nikiambi Jean Lema*, 58 Agric. Dec. 302, 305 (1999) (Order Denying Pet. for Recons. and Mot. To Transfer Venue). *Cf. In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 492 (1997) (stating the Chief Administrative Law Judge does not have authority to transfer a case to a district court of the United States under the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

13*In re Reginald Dwight Parr*, 59 Agric. Dec.___, slip op. at 23 (Order Denying Respondent's Pet. for Recons.); *In re Mangos Plus, Inc.*, 59 Agric. Dec.___, slip op. at 11 (Sept. 7, 2000 (Order Denying Pet. for Recons.); *In re David Tracy Bradshaw*, 59 Agric. Dec.___, slip op. at 6 (Aug. 3, 2000) (Order denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order

Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

APPENDIX G

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 99-0013

IN RE:

WILLIAM J. REINHART AND
REINHART STABLES,
RESPONDENTS

DECISION AND ORDER

Filed November 9, 2000

Procedural History

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on March 10, 1999. Complainant institute the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice]. Complainant alleges that on October 28, 1998, William J. Reinhart allowed the entry of a horse called "Double Pride Lady" as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ 3).

On April 2, 1999, William J. Reinhart filed a Response to the Complaint. In his Response, William J. Reinhart admits he is the owner of Double Pride Lady and admits he allowed the entry of Double Pride Lady at the National Walking Horse Trainers

Show in Shelbyville, Tennessee. However, William J. Reinhart denies Double Pride Lady was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), when he allowed her entry at the National Walking Horse Trainers Show in Shelbyville, Tennessee. (Response.)

On June 28, 1999, Complainant filed a Motion to Amend Complaint and an Amended Complaint. Complainant moved to amend the Complaint to add Reinhart Stables as a respondent (Motion to Amend Compl. ¶ 2). On August 5, 1999, William J. Reinhart filed an untitled document in which he opposed Complainant's Motion to Amend Complaint. On August 24, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] granted Complainant's Motion to Amend Complaint and deemed William J. Reinhart's opposition to Complainant's Motion to Amend Complaint to be William J. Reinhart's and Reinhart Stables' [hereinafter Respondents] Answer to the Amended Complaint (Order Granting Complainant's Motion to Amend Complaint).[1]

The Amended Complaint alleges that on October 28, 1998, Respondents entered and allowed the entry of Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore, in violation of sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)) (Amended Compl. ¶ 6).

The ALJ presided at a hearing in Nashville, Tennessee, on October 13 and 14, 1999. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. William J. Reinhart represented Reinhart Stables and himself.

On December 10, 1999, Respondents filed a Post-Hearing Brief. On December 27, 1999, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law and Memorandum of Point and Authorities in Support Thereof [hereinafter Complainant's Post-Hearing Brief]. On January 10,

2000, Complainant filed Complainant's Reply to Respondents' Post-Hearing Brief. On January 27, 2000, Respondents filed a Motion for Dismissal and Reply Brief of Respondent.

On June 5, 2000, the ALJ issued an Initial Decision and Order in which the ALJ: (1) concluded that on October 28, 1998, William J. Reinhart, acting as an owner of Reinhart Stables, violated section (5)(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore; (2) concluded that Reinhart Stables is merely a name under which William J. Reinhart does business; (3) assessed William J. Reinhart a $2,000 civil penalty; and (4) disqualified William J. Reinhart for 5 years from exhibiting, showing, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 4, 13-14).

On July 6, 2000, Respondents appealed to the Judicial Officer. On September 5, 2000, Complainant filed Complainant's Response to Respondents' Appeal of Decision and Order [hereinafter Complainant's Response to Respondents' Appeal Petition] and Complainant's Appeal of Decision and Order [hereinafter Complainant's Appeal Petition]. On September 27, 2000, Respondents filed Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order[2] and Respondent's Response to Complainant's Appeal of Decision and Order.

On October 2, 2000, Respondents filed a motion requesting a list of citations and a motion requesting a transcript of the hearing. On November 1, 2000, Complainant filed responses to Respondents' motion requesting a list of citations and Respondents' motion requesting a transcript of the hearing. On November 3, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision, a ruling on Respondents' motion requesting a list of citations, and a ruling on

Respondents' motion requesting a transcript of the hearing.

I have considered the entire record in this proceeding. I have not considered Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order.[3] To the extent indicated, I have adopted proposed findings, proposed conclusions, and arguments; otherwise, they have been rejected as irrelevant or not supported by the evidence. Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion of sanctions, as restated.

Complainant's exhibits are designated by "CX"; Respondents' exhibits are designated by "RX"; and transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15 - COMMERCE AND TRADE

. . .

CHAPTER 44 - PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that -

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person or any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a

horse, or

(D) any other substance or device has been used by a person on any limb of a horse of a person has engaged in a practice involving a horse,

and as a result of such application, infliction, injection use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that -

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, were such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or

offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty

authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

§ 1827. Utilization of personnel of Department of Agriculture and officers and employees of consenting States; technical and other nonfinancial assistance to State

(c) Assistance from Department of Agriculture and States

The Secretary, in carrying out the provisions of this chapter, shall utilize, to the maximum extent practicable, the existing personnel and facilities of the Department of Agriculture. The Secretary is further authorized to utilize the officers and employees of any State, with its consent, and with or without reimbursement, to assist him in carrying out the provisions of this chapter.

(d) Assistance to States

The Secretary may, upon request, provide technical and other nonfinancial assistance (including the lending of equipment on such terms and conditions as the Secretary determines is appropriate) to any State to assist it in administering and enforcing any law of such State designed to prohibit conduct described in section 1824 of this title.

§ 1829. Preemption of State laws; concurrent jurisdiction; prohibition on certain State action

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. Nor shall any provision of this chapter be construed to exclude the Federal Government from enforcing the provision of this chapter within any State, whether or not such State has enacted legislation on the same subject, it being the intent of the Congress to establish concurrent jurisdiction with the States over such subject matter. In no case shall any such State take action pursuant to this section involving a violation of any such law of that State which would preclude the United States from enforcing the provisions of this chapter against any person.

15 U.S.C. §§ 1821(3), 1822, 1824(2), 1825(b)(1)-(2), (c), 1827, 1829.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

1. Respondent William J. Reinhart, doing business as Reinhart Stables, is the owner of a horse known as "Double Pride Lady." William J. Reinhart's mailing address is 3878 Murfreesboro Highway, Manchester, Tennessee 37355. (CX 2, CX 6.)

2. William J. Reinhart employed Jack Stepp, full time, as a trainer of Double Pride Lady (Tr. 190-91).

3. On October 28, 1998, William J. Reinhart entered for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee (CX 2, CX 3, CX 4, CX 5).

4. At the National Walking Horse Trainers Show, Designated Qualified Persons[4] Mark Thomas and Bob Flynn examined Double Pride Lady. Mark Thomas and Bob Flynn determined Double Pride Lady was sensitive in both front feet and refused to allow Double Pride Lady to be shown at the National Walking Horse Trainers Show. (Tr. 46-47; CX 9, CX 10, CX 15, CX 16, CX 17.)

5. United States Department of Agriculture veterinary medical officers routinely monitor examinations conducted by Designated Qualified Persons. United States Department of Agriculture veterinary medical officers also randomly select horses, which have been entered at horse shows, and conduct their own examinations to determine whether these horses are sore. Two United States Department of Agriculture veterinary medical officers, Dr. John Edward Slauter and Dr. David C. Smith, were assigned to the National Walking Horse Trainers Show. (Tr. 19-21, 30-31, 87-89, 99.)

6. Dr. Slauter had been practicing veterinary medicine for 27 years at the time of the National Walking Horse Trainers Show. For the past 10 years, Dr. Slauter has been a United States Department of Agriculture veterinary medical officer. Dr. Slauter has personally examined at least 300 horses for compliance with the Horse Protection Act and has overseen inspections of several thousand horses by Designated Qualified Persons. (Tr. 14-17, 20-21.) Dr. Slauter is well qualified to examine horses to determine whether they are "sore" as defined in the Horse Protection Act. I found Dr. Slauter to be a forthright and credible witness.

7. Dr. Slauter observed Designated Qualified Persons Mark Thomas and Bob Flynn examine Double Pride Lady, who "led up to the inspection area very reluctant to move" (CX 9; Tr. 45-47). After Mark Thomas and Bob Flynn had examined Double Pride Lady, finding her to be sensitive on both front feet, Dr. Slauter

examined Double Pride Lady (CX 9; Tr. 46-47). Dr. Slauter testified that he did not specifically remember his examination of Double Pride Lady. However, Dr. Slauter testified that he prepared an affidavit (CX 9) and the Summary of Alleged Violations form (CX 6) while his examination of Double Pride Lady was fresh in his mind and that his affidavit and the Summary of Alleged Violations form are accurate. (Tr. 36-37, 40-45.) Dr. Slauter repeatedly palpated Double Pride Lady, finding her to be bilaterally sore. Dr. Slauter found Double Pride Lady to be sore at the pastern of the left front foot just above the bulb of the heel and on the medial and lateral aspects of the pastern of the right front foot. (CX 6, CX 9; Tr. 47.) After Dr. Slauter completed his examination of Double Pride Lady, he asked Dr. Smith to examine Double Pride Lady (Tr. 47-48).

8. Dr. Smith had been practicing veterinary medicine for 11 years at the time of the National Walking Horse Trainers Show. Dr. Smith has been employed by the Animal and Plant Health Inspection Service, United States Department of Agriculture, for the past 3 years. (Tr. 85-86.) Dr. Smith has personally examined approximately 300 to 600 horses for compliance with the Horse Protection Act (Tr. 89). Dr. Smith is well qualified to examine horses to determine whether they are "sore" as defined in the Horse Protection Act. I found Dr. Smith to be a forthright and credible witness.

9. Dr. Smith testified that he did not specifically remember his examination of Double Pride Lady. However, Dr. Smith testified that he prepared an affidavit (CX 10) and the Summary of Alleged Violations form (CX 6) while his examination of Double Pride Lady was fresh in his mind and that his affidavit and the Summary of Alleged Violations form are accurate. (Tr. 99-103.) Double Pride Lady exhibited consistent and repeatable pain responses each time Dr. Smith palpated Double Pride Lady's pastern on the medial and lateral heel bulbs of the left front foot and on the medial and lateral aspects of the pastern of the right front foot (CX 6, CX 10).

10. After their examinations, Drs. Slauter and Smith agreed Double Pride Lady was bilaterally "sore" as defined in the Horse

Protection Act (CX 9, CX 10).

Conclusions of Law

1. On October 28, 1998, Respondent William J. Reinhart, doing business as Reinhart Stables, violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering for the purpose of showing or exhibiting the horse known as "Double Pride Lady" as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore.

2. Respondent Reinhart Stables is merely a name under which Respondent William J. Reinhart does business.

Discussion

Congress found "the soring of horses is cruel and inhumane" and "horses shown or exhibited which are sore, where such soreness improves the performance. . ., compete unfairly with horses which are not sore" (15 U.S.C. § 1822(1)-(2)). Congress made it unlawful to: (1) show or exhibit a sore horse in any horse show or horse exhibition; (2) enter for the purpose of showing or exhibiting a sore horse in any horse show or horse exhibition; or (3) allow the showing of a sore horse in any horse show or horse exhibition. 15 U.S.C. § 1824(2)(A)-(B), (D). The term "sore" describes a horse, which, as a result of the use of a substance or practice, suffers, or can reasonably be expected to suffer, "physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving" (15 U.S.C. § 1821(3)).

Based on the credible testimony of Drs. Slauter and Smith, I find Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on October 28, 1998. Drs. Slauter and Smith, who examined Double Pride Lady, are experienced and qualified veterinarians and were credible witnesses. Each veterinarian independently palpated Double Pride Lady's pasterns. Double Pride Lady exhibited strong and definite pain responses to each veterinarians' palpation of her forelimbs. (Tr. 47, 100; CX 9,

CX 10.) Abnormal sensitivity in a horse's forelimbs raises a rebuttable presumption that the horse has been sored (15 U.S.C. § 1825(d)(5)).

Respondents contend that palpation alone is not sufficient to determine whether a horse is sore. Respondents also believe that Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady should be deemed unreliable because Complainant fails to "cite one scientific study or any medical data" that supports palpation as a reliable means for determining soreness in horses (Tr. 12-13, 328-29) and because Dr. Slauter and Dr. Smith failed to examine Double Pride Lady in accordance with the procedures recommended in the Atlanta Protocol (RX 1).[5] Respondents also cite *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), in support of their position that digital palpation alone is not a reliable method by which to determine whether a horse is sore (Respondents' Post-Hearing Brief at 10-11; Tr. 251-59).

The United States Department of Agriculture has used palpation to determine whether a horse is sore within the meaning of the Horse Protection Act for the past 30 years. The Judicial Officer and the two circuits in which this case may be appealed have held palpation to be the accepted method for determining whether a horse is sore. In *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1412-14 (6th Cir. 1995), the Court held that "pursuant to the [Horse Protection Act], the agency need not show inflammation or lameness in addition to a pain reaction in order to conclude that a horse is 'sore,'" and a horse's reaction to digital palpation alone is sufficient to invoke the presumption that the horse is sore. In the other circuit in which this case may be appealed, the United States Court of Appeals for the District of Columbia Circuit held in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49-50 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995), palpation is an effective method for concluding that a horse is sore. In *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 959-60 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug 5, 1997), the Judicial Officer held that the scientific basis for palpation is not necessary to be shown, and in *In re Kim Bennett*, 55 Agric. Dec.

176, 180-81 (1996), the Judicial Officer rejected the Atlanta Protocol and held "palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act."

Respondents also contend the United States Department of Agriculture veterinary medical officers' affidavits and Summary of Alleged Violations form (CX 6, CX 9, CX 10) are inadmissible hearsay because they were prepared in anticipation of litigation and do not meet the standard of evidence that was set out in *Young*, 53 F.3d 627 (5th Cir. 1995) (Respondents' Post-Hearing Brief at 8-9). Respondents cite *Palmer v. Hoffman*, 318 U.S. 109 (1943), which held that an accident report prepared by a railroad company did not carry the indicia of reliability of a routine business record because the accident report was prepared at least partially in anticipation of litigation and also cite *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979), which held that an affidavit prepared by an officials of the United States Treasury Department was unreliable because the affidavit was prepared in anticipation of litigation (Respondents' Post-Hearing Brief at 9). Respondents further rely on the Fifth Circuit's holding in *Young*, 53 F.3d at 731, that the probative value of the United States Department of Agriculture veterinary medical officers' affidavits is limited because the affidavits were prepared in anticipation of litigation and because the affidavits only described observations supporting the conclusion that the horse in question was sore.

Dr. Slauter's and Dr. Smith's affidavits and the Summary of Alleged Violations form (CX 6, CX 9, CX 10) are reliable and probative hearsay statements. Under the Rules of Practice, 7 C.F.R. § 1.141(h), and the Administrative Procedure Act, 5 U.S.C. § 556(d), hearsay statements are admissible into evidence. As held in *In re Kim Bennett*, "the business of the Animal and Plant Health Inspection Service under the Horse Protection Act is investigating and litigating, where violations are found. As law enforcement officers, it is the duty of [veterinary medical officers] to detect violations of the federal statute and to initiate the procedure for bringing disciplinary complaints against the violators. Hence, litigating is 'the inherent nature of the business in question' . . .,

and the preparation of the Summary of Alleged Violations form and affidavits is the most important of the 'methods systematically employed for the conduct of the business as a business.'" *In re Kim Bennett*, 55 Agric. Dec. at 213-14 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 115 (1943)).

This case cannot be appealed to the United States Court of Appeals for the Fifth Circuit. Therefore, the *Young* decision does not govern. The United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Sixth Circuit are the appellate courts that may hear this matter and, as such, their views will determine whether hearsay is admissible. In *Crawford*, 50 F.3d at 49, the District of Columbia Circuit confirmed that administrative agencies are not barred from reliance on hearsay evidence, which only need bear satisfactory indicia of reliability. Likewise, the Sixth Circuit held in *Bobo*, 52 F.3d at 1412-14, that the affidavits of and the Summary of Alleged Violations forms completed by four veterinary medical officers were sufficient to invoke the presumption, for the purpose of charges against the owner, that the horse in question was "sore" as defined by the Horse Protection Act, despite the contention that the affidavits were hearsay. Although in *Bobo*, three of the United States Department of Agriculture veterinary medical officers testified that they were unable to independently recall their examinations of the horse in question, they stated that they documented their examinations in written statements and signed their written statements while the details of their examinations were fresh in their minds. The Court emphasized that the written forms and affidavits contained great detail concerning the examinations of the horse in question, and the owner and trainer were given the opportunity to cross-examine the United States Department of Agriculture veterinary medical officers as to the content of these reports. *Bobo*, 52 F.3d at 1414.

In the instant proceeding, both Dr. Slauter and Dr. Smith testified that they did not recall their examinations of Double Pride Lady. However, they also testified that they completed the Summary of Alleged Violations from and documented their findings in affidavits while the facts were still fresh in their minds.

(Tr. 31-32, 36-37, 40-45, 99-103.) Respondents had the opportunity to cross-examine Dr. Slauter and Dr. Smith regarding the content of their affidavits and the Summary of Alleged Violations form. Moreover, Dr. Slauter's affidavit, Dr. Smith's affidavit, and the Summary of Alleged Violations form contain great detail concerning the examinations of Double Pride Lady (CX 6, CX 9, CX 10). Therefore, these hearsay statements are reliable, probative, and admissible.

Respondents presented three witnesses: (1) William J. Reinhart's wife, Judith Reinhart; (2) Double Pride Lady's trainer, Jack Stepp, who was sanctioned by the National Horse Show Commission in connection with the entry of Double Pride Lady at the National Walking Horse Trainers Show on October 28, 1998 (Tr. 282-86); and (3) the steward at the National Walking Horse Trainers Show, Charles L. Thomas. None of Respondents' witnesses examined Double Pride Lady for compliance with the Horse Protection Act. Charles L. Thomas, who is a Designated Qualified Person, was only serving as a steward at the National Walking Horse Trainers Show. He merely viewed Double Pride Lady's movement but did not palpate her. Charles L. Thomas testified that, when he observed Double Pride Lady, he formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act and could not testify whether Double Pride Lady was sore under the Horse Protection Act and could not testify whether Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the National Walking Horse Trainers Show. (Tr. 127, 138, 145-50.) Respondents' evidence fails to rebut Complainant's evidence that Double Pride Lady was sore when William J. Reinhart entered her at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on October 28, 1998.

Respondents further contend the Horse Protection Act is unconstitutional as it does not fall within the confines of the Commerce Clause of the United States Constitution. Respondents rely on *United States v. Lopez*, 514 U.S. 549 (1995), which held that the Gun-Free School Zones Act of 1990 was invalid as it went beyond Congress' power to regulate commerce. The Gun-Free School Zones Act of 1990 made the intentional possession of a firearm in a school zone a federal offense. *Lopez*, 514 U.S. at 551.

The Court in *Lopez* held that the activity being regulated must substantially affect interstate commerce and brining guns onto a school ground does not have a great enough effect on interstate commerce to qualify for regulation under the Commerce Clause. Respondents compare their case to *Lopez* and argue that participation in a Tennessee walking horse exhibition does not have a substantial enough effect on interstate commerce to warrant regulation under the Commerce Clause. Respondents emphasize that the prizes are minimal (only $100 or so) and argue that these shows are presented merely for leisurely purposes.

In another case concerning Congress' power to regulate under the Commerce Clause, the Supreme Court in *United States v. Morrison*, 120 S. Ct. 1740 (2000), confirmed the holding that Congress' power to regulate through the Commerce Clause is allowed only in situations in which the activity to be regulated, if not a channel or instrumentality of interstate commerce, substantially affects interstate commerce. In *Morrison*, the Court invalidated a federal statute that provided a federal civil remedy for victims of gender-motivated crimes. The Court held that crimes that are gender-motivated are not economic activity and their results do not affect interstate commerce.

While ad administrative law judge may not dismiss a case based upon a finding of unconstitutionality of the statute under which the case is instituted, the administrative law judge may render an opinion on the issue. *See Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958); *In re Utica Packing Co.*, 39 Agric. Dec. 590, 599 (1980). I do not agree that the Horse Protection Act is unconstitutional.

Lopez identified the three categories of activity that Congress may regulate under the Commerce Clause. Congress may regulate the use of channels of interstate commerce (roadways, railways, etc.); Congress may regulate and protect the instrumentalities of interstate commerce or persons and things in interstate commerce; and Congress may also regulate activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*,

312 U.S. 100 (1941). The activities regulated under the Horse Protection Act fall within the third category, as they have a substantial effect on interstate commerce.

The Horse Protection Act regulates an industry, not just a leisurely activity, as Respondents contend. Although this industry only provides minimal monetary returns in the form of prizes for the owner, it is an occupation for the individuals who prepare the horse for competition. Those who train, groom, and transport the horses would be adversely affected if the Horse Protection Act were not in place. Not only does the soring of horses endanger the health of the animals, but it also could affect the employment status of those who service horses that are unfairly disadvantaged.

Respondents also argue the Horse Protection Act encroaches upon the sovereignty of the State of Tennessee, which also has a statute prohibiting the soring of horses. A federal statute may be found to encroach upon the sovereignty of a state if: (1) the federal statute compels a state to enact or enforce a particular law;[6] (2) the federal statute compels state or local officials to perform specific federal administrative tasks;[7] or (3) the federal statute infringes on the authority of the people of a state to determine the qualifications for office of state governments officials.[8] The Horse Protection Act does not require the State of Tennessee to enact or enforce any law, does not require state or local officials to perform federally delegated tasks, and does not infringe on the authority of the people of the State of Tennessee to determine qualifications for office of state government officials. The United States Department of Agriculture polices horse shows, using its own employees, and holds violators accountable through its own administrative law procedures. The State of Tennessee may still enforce its own statute and is not required to administer or enforce the Horse Protection Act (15 U.S.C. §§ 1827, 1829). Therefore, the Horse Protection Act does not encroach upon the sovereignty of the State of Tennessee.

Respondents also filed a Motion for Dismissal on January 27, 2000. In the Motion for Dismissal, Respondents argue that the Complaint should be dismissed because of an extension granted to Complainant to file Complainant's Post-Hearing Brief.

Respondents' Motion for Dismissal is denied. The extension was appropriate and caused no prejudice to Respondents.

Sanctions

The Horse Protection Act authorizes the assessment of a civil penalty of not more than $2,000 for each violation. 15 U.S.C. § 1825(b)(1). The Horse Protection Act also authorizes the disqualification, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction, or any person who is assessed a civil penalty. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation. 15 U.S.C. § 1825(c).

Complainant requests that I assess William J. Reinhart a $2,000 civil penalty and disqualify William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. Complainant also requests that any period of disqualification imposed on William J. Reinhart in this Decision and Order be consecutive to, rather than concurrent with, the disqualification of William J. Reinhart in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd sub nom. Reinhart v. United States Dep't of Agric.*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). Complainant also requests that I assess Reinhart Stables a $2,000 civil penalty and disqualify Reinhart Stables from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for 1 year.

The main purpose of the Horse Protection Act is to prevent the cruel, inhumane, and unfair practice of soring horses. Since deterrence is the goal of the Horse Protection Act, monetary penalties are not enough to achieve this goal. The Judicial Officer has held that disqualification is an appropriate sanction in almost every Horse Protection Act case. In *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1951-52 91981), *aff'd*, 713 F.2d 179 (6th Cir. 1983), the Judicial Officer stated:

> Congress has provided the Department with the "tools" needed to eliminate the practice of soring Tennessee Walking Horses. But they must be used, to be effective. In order to achieve the Congressional purpose of the Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on every horse owner (and trainer) who allows one of his horses to be exhibited while sore. [Footnote omitted.]

See also In re John Allan Callaway, 52 Agric. Dec. 272, 295-96 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20, 60-61 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

William J. Reinhart has violated the Horse Protection Act before. *See In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd sub nom. Reinhart v. United States Dep't of Agric.*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). Therefore, I find disqualification of William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for the minimum 5-year period for a second violation of the Horse Protection Act, to be an appropriate sanction. 15 U.S.C. § 1825(c).

As far as sanctions for Reinhart Stables are concerned, the evidence indicates that Reinhart Stables is merely a name under which William J. Reinhart was conducting business. Thus, sanctioning Reinhart Stables would be redundant. Therefore, I conclude the sanctions requested by Complainant for Reinhart Stables are inappropriate.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents' Appeal Petition

Respondents raise 15 issues in their Petition for Review [hereinafter Respondents' Appeal Petition]. First, Respondents contend the ALJ erroneously accepted and considered

Complainant's Post-Hearing Brief, which Respondents content Complainant filed late (Respondents' Appeal Pet. at 3).

The ALJ ordered Complainant to "mail" Complainant's Post-Hearing Brief no later than December 10, 1999 (Tr. 332). On December 7, 1999, Complainant requested that the ALJ extend the time for "filing and mailing" Complainant's Post-Hearing Brief to December 23, 1999 (Motion to Amend Briefing Schedule). On December 7, 1999, the ALJ extended the time for "filing" Complainant's Post-Hearing Brief to December 23, 1999 (Order Extending Briefing Schedule). On December 14, 1999, Respondents requested that the ALJ reconsider the extension of time granted to Complainant for filing Complainant's Post-Hearing Brief (Statement in Opposition to Government's Motion for Extension of Time to File Briefs). On December 15, 1999, the ALJ rejected Respondents' request (Order).

Complainant did not file Complainant did not file Complainant's Post-Hearing Brief until December 27, 1999. However, Complainant asserts Complainant's Post-Hearing Brief was timely filed, as follows:

> On December 23, 1999, Department of Agriculture employees were given early dismissal because of the Christmas holiday, and the Office of the Hearing Clerk closed early. Counsel for [C]omplainant, by telephone, requested and was granted leave to file [C]omplainant's [P]ost-[H]earing [B]rief on the following business day, December 27, 1999. (December 24th was a federal holiday). The extension of time was for good cause, in accordance with the Rules of Practice. 7 C.F.R. § 1.147(f).
>
> The [C]omplainant's [P]ost-[H]earing [B]rief was filed on December 27, 1999, and was timely filed in accordance with the Rules of Practice. 7 C.F.R. § 1.147(g).

Complainant's Response to Respondents' Appeal Petition at 3.

Complainant does not cite, and I cannot locate, any filing by the ALJ granting Complainant's oral request to extend the time for

filing Complainant's Post-Hearing Brief to December 27, 1999. I find the lack of any filing granting Complainant's oral request for an extension of time, troubling. However, Respondents raised the issue of the timeliness of Complainant's Post-Hearing Brief before the ALJ in a Motion for Dismissal filed January 27, 2000. The ALJ denied Respondents Motion for Dismissal stating "the extensions were appropriate and caused no prejudice to Respondent[s]." (Initial Decision and order at 11.) Based on the ALJ's ruling on Respondents' Motion for Dismissal, I find Complainant orally requested that the ALJ extend the time for filing Complainant's Post-Hearing Brief to December 27, 1999, and the ALJ orally granted Complainant's request. Therefore, I find Complainant timely filed Complainant's Post-Hearing Brief on December 27, 1999, and I reject Respondents' contention that the ALJ erroneously accepted and considered Complainant's Post-Hearing Brief.

Second, Respondents contend the disparate application of section 1,147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) to parties in administrative proceedings conducted under the Rules of Practice violates Respondents' rights to due process of law. Specifically, Respondents contend the Judicial Officer strictly applies 7 C.F.R. § 1.147(g) to the respondents in administrative proceedings and rejects documents filed by respondents that do not timely reach the Hearing Clerk. Respondents contend that, in contrast to the strict application of 7 C.F.R. § 1.147(g) to the respondents, the Judicial Officer accepts and considers documents filed by complainants that do not time reach the Hearing Clerk. Respondents cite *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), as an example of the Judicial Officer's disparate treatment of the respondents and the complainants in administrative proceedings conducted under the Rules of Practice. (Respondents' Appeal Pet. at 3-5.)

Section 1.147(g) of the Rules of Practice provides that any document or paper filed in an administrative proceeding conducted under the Rules of Practice shall be deemed to be filed at the time when it reaches the Hearing Clerk, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

As an initial matter, the purported disparate application of 7 C.F.R. § 1.147(g) to litigants in prior proceedings is not relevant to this proceedings. Respondents' argument that they have been denied due process in this proceeding because the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to litigants in prior proceedings is without merit.

Moreover, the Judicial Officer has been punctilious about the application of 7 C.F.R. § 1.147(g) to the complainants, as well as the respondents, in administrative proceedings conducted under the Rules of Practice.[9] Nothing in *In re Jack Stepp* supports Respondents' contention that the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to the litigants in that proceeding.

The Rules of Practice are binding on administrative law judges and the Judicial Officer,[10] and administrative law judges and the Judicial Officer have very limited authority to modify the Rules of Practice in a proceeding.[11] Even if an administrative law judge or the Judicial Officer was presented with a circumstance in which the administrative law judge or the Judicial Officer had authority to modify the Rules of Practice, I cannot now conceive of a circumstance in which an administrative law judge or the Judicial Officer would modify 7 C.F.R. § 1.147(g) in a manner which would result in the disparate application of 7 C.F.R. §1.147(g) to litigants in a proceeding.

The record in this proceeding does not reveal that the ALJ or the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to

the parties. All of Respondents' and Complainant's filings have been timely filed. Neither the ALJ nor the Judicial Officer has rejected a filing in this proceeding because it did not timely reach the Hearing Clerk. Therefore, I find no basis for Respondents' contention that the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to Respondents and Complainant, and I find no basis for Respondents' contention that the disparate application of 7 C.F.R. § 1.147(g) to Respondents and Complainant denied Respondents due process under the Fifth Amendment to the United States Constitution.

Third, Respondents contend section 1.147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) is contrary to *Carroll v. C.I.R.*, 71 F.3d 1228 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). Respondents assert that *Carroll* requires federal administrative agencies to provide that the effective date of filing in administrative proceedings is the date a properly addressed document, bearing proper postage, and sent by regular mail, is postmarked [hereinafter the mailbox rule]. (Respondents' Appeal Pet. at 3, 5.)

None of Respondents' fillings have been rejected because they did not timely reach the Hearing Clerk, as provided in 7 C.F.R. § 1.147(g). Therefore, the application to this proceeding of 7 C.F.R. § 1.147(g), rather than the mailbox rule, has not resulted in the rejection of any of Respondents' filings. Even if I found that the Secretary of Agriculture is required by *Carroll* to apply the mailbox rule to this proceeding (which I do not find), that finding would have no effect on the timeliness of Respondents' filings. Under these circumstances, I find Respondents' contention that the mailbox rule must be applied to determine the effective date of filing has no relevance to this proceeding.

Moreover, in *Carroll*, the United States Court of Appeals for the Sixth Circuit did not hold that federal agencies must adopt the mailbox rule in administrative proceedings, as Respondents assert. Instead, the Sixth Circuit found that the petitioners in *Carroll* could not invoke the common law presumption that the Internal Revenue Service received their properly addressed communication bearing proper postage after the normal 2- or 3-day interval

necessary for United States Postal Service delivery. *Carroll*, 71 F.3d at 1230, 1233, I find *Carroll* inapposite. Nothing in *Carroll* requires the Secretary of Agriculture to adopt the mailbox rule in this proceeding or any other United States Department of Agriculture administrative proceeding.

Fourth, Respondents contend the ALJ erroneously excluded the Atlanta Protocol. Specifically, Respondents contend the ALJ's exclusion of the Atlanta Protocol is reversible error because: (1) months before the hearing, Respondents listed the Atlanta Protocol as one of the documents which they would introduce at the hearing; (2) Respondents laid the proper foundation for the Atlanta Protocol through Charles L. Thomas; and (3) the United States Court of Appeals for the Fifth Circuit in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), accepted and relied on the Atlanta Protocol. (Respondents' Appeal Pet. at 5-9.)

I disagree with Respondents' contention that their listing the Atlanta Protocol as a document, which they would introduce at the hearing, requires the ALJ to admit the Atlanta Protocol into evidence. Section 1.140(a)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.140(a)(1)(iii)) provides that an administrative law judge may order each party to furnish copies of or a list of documents which that party anticipates introducing at the hearing. On May 11, 1999, pursuant to 7 C.F.R. § 1.140(a)(1)(iii), the ALJ issued an order requiring Complainant and Respondents to exchange copies of proposed hearing exhibits (Summary of Telephone Conference ¶ 2). On August 31, 1999, Respondents filed with the Hearing Clerk a list of the witnesses they intended to call and a list of the documents they intended to introduce at the hearing. Respondents listed the Atlanta Protocol as one of the documents which they intended to introduce into evidence. (Respondent's List of Witnesses and Exhibits.) However, the act of filing a list of documents, which a party anticipates introducing at the hearing, does not require the administrative law judge presiding at the hearing to admit the listed documents into evidence.

Section 1.141(h)(1)(iv) of the Rules of Practice provides that evidence may be excluded, as follows:

§ 1.141 Procedure for hearing.

. . . .

(h) Evidence - (1) *In general.*

. . . .

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Therefore, even if a party identifies a document as one which that party anticipates introducing into evidence, the administrative law judge presiding at the hearing may exclude the document because it is immaterial, irrelevant, unduly repetitious, or not the sort upon which responsible persons are accustomed to rely.

Respondents attempted to introduce the Atlanta Protocol through Jack Stepp, who could not authenticate the Atlanta Protocol, and the ALJ properly excluded the Atlanta Protocol as follows:

MS. CARROLL: Your Honor, could I also note for the record an objection on foundation grounds? Unless Mr. Stepp is going to testify that he participated in the preparation of this document, I think there's a foundation problem and an authentication problem.

JUDGE BERNSTEIN: Well I think someone should probably explain what this document is. Mr. Reinhart?

MR. REINHART: Yes?

JUDGE BERNSTEIN: Someone should explain what this document is.

MR. REINHART: Yes, I'll be glad to. Would you like me to explain it now?

MS. CARROLL: He's not under oath.

JUDGE BERNSTEIN: You're not under oath.

MR. REINHART: Oh, well, could you explain what the document is, Mr. Stepp?

THE WITNESS: It's just –

JUDGE BERNSTEIN: I don't want you to read it, just tell me where it came from.

THE WITNESS: It's just –

JUDGE BERNSTEIN: I don't want you to read it, just tell me where it came from.

THE WITNESS: What it tells me that –

JUDGE BERNSTEIN: No, I don't want you to tell me what it says, I want you to tell me where it came from, what's the background of this?

THE WITNESS: Well, a group of veterinarians and doctors, it was in the early '90s sometime I think they went down in Georgia and they set down the rules and regulations governing the –

JUDGE BERNSTEIN: So this is what they think should be the standards for evaluating horses.

THE WITNESS: Horses, yes sir.

MS. CARROLL: Same objection unless any of those – the authors of this document are here to be cross examined. Mr. Stepp doesn't – I assume didn't participate in this and doesn't – cannot be cross examined on the validity of the statements in here. This is a third party document and as such it's hearsay, it's not regulations, it's opinions of third parties who are not available for cross examination. And it is offered, I assume, to establish the truth of the statements that it contains.

MR. REINHART: It was accepted as evidence in the Fifth Circuit.

JUDGE BERNSTEIN: One moment. I've had cases way back in which I've had veterinarians testify about it, but that's not the case here. I think the objection is well-founded and I will reverse my ruling and not admit the document, since it is hearsay of a type that should not be admitted.

Tr. 257-59.

I also disagree with Respondents' contention that the ALJ's exclusion of the Atlanta Protocol is reversible error because they laid the proper foundation for the Atlanta Protocol through Charles L. Thomas (Respondents' Appeal Pet. at 5-6). I

thoroughly reviewed Charles L. Thomas' testimony and cannot locate any testimony about the Atlanta Protocol (Tr. 126-73). Therefore, I reject Respondents' contention that they laid the proper foundation for the Atlanta Protocol through Charles L. Thomas.

Further, I disagree with Respondents' contention that the ALJ's exclusion of the Atlanta Protocol is reversible error because the United States Court of Appeals for the Fifth Circuit, in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), accepted and relied on the Atlanta Protocol (Respondents' Appeal Pet. at 6, 8-9).

Appeal in this proceeding does not lie to the United States Court of Appeals for the Fifth Circuit. Moreover, the two circuits in which this case may be appealed rejected the position taken by Respondents, which is similar to the conclusion in the Atlanta Protocol, that palpation alone is not sufficient to determine whether a horse is sore. In *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1412-14 (6th Cir. 1995), the Court held that, pursuant to the Horse Protection Act, the United States Department of Agriculture need not show inflammation or lameness, in addition to a pain reaction, in order to conclude that a horse is sore under the Horse Protection Act and that a finding of soreness based on the results of digital palpation alone is sufficient to raise the presumption that a horse is sore. In the other circuit to which appeal in this proceeding lies, the United States Court of Appeals for the District of Columbia Circuit held that palpation, whether used alone or not, is an effective diagnostic technique by which to determine whether a horse is sore. *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 50 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995). Thus, I conclude the ALJ's failure to follow *Young* is not error.

Even if Respondents could appeal to the United States Court of Appeals for the Fifth Circuit, I would find *Young* apposite. The Court in *Young* held that digital palpation alone is not a reliable method by which to determine whether a horse is sore. However, the holding in *Young* is based upon a number of factors that are not present in this proceeding. In *Young*, several

"highly qualified expert witnesses" testified for the respondents that "soring could not be diagnosed through palpation alone." *Young*, 53 F.3d at 731. Respondents, in this proceeding, did not introduce expert witness testimony that soring could not be diagnosed through palpation alone. Moreover, Dr. Slauter and Dr. Smith based their determinations that Double Pride Lade was sore not only on Double Pride Lady's reaction to palpation, but also on their observations of Double Pride Lady's movement (Tr. 46, 108-09; CX 9, CX 10).

In *Young*, two private veterinarians and one off-duty Designated Qualified Person testified they examined the horse in question immediately after United States Department of Agriculture veterinary medical officers found the horse was sore. These private veterinarians and the off-duty Designated Qualified person testified they did not find the horse to be sore. *Young*, 53 F.3d at 731-32. The record in this proceeding does not contain any testimony regarding an examination of Double Pride Lady immediately after Drs. Slauter and Smith concluded their examinations. Moreover, Mark Thomas and Bob Flynn, the two Designated Qualified Persons who examined Double Pride Lady at the National Walking Horse Trainers Show, determined that Double Pride Lady was sensitive in both front feet, issued a ticket for bilateral soring, and refused to allow Double Pride Lady to be shown at the National Walking Horse Trainers Show. (Tr. 46-47; CX 9, CX 10, CX 15, CX 16, CX 17.)

In *Young*, the administrative law judge found the respondents' witnesses to be more credible than the complainant's witnesses. *Young*, 53 F.3d at 732. In the instant proceeding, the ALJ found Dr. Slauter and Dr. Smith forthright and credible witnesses and Dr. Slauter's affidavit (CX 9), Dr. Smith's affidavit (CX 10), the Summary of Alleged Violations form (CX 6), and Dr. Slauter's and Smith's testimony reliable (Initial Decision and Order at 3, 5, 7-8). The ALJ also found Respondents' three witnesses, none of whom examined Double Pride Lady for compliance with the Horse Protection Act, failed to rebut Complainant's evidence that Double Pride Lady was sore (Initial Decision and Order at 8).

Finally, in *Young*, the administrative law judge dismissed the complaint and the Judicial Officer reversed the administrative law judge. *Young*, 53 F.3d at 732. In the instant proceeding, the ALJ and the Judicial Officer agree that the evidence supports the conclusion that William J. Reinhart violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore.

Therefore, I find *Young* inapposite. I find the ALJ did not err by failing to following the holding in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995).

Fifth, Respondents contend that "palpation is not in compliance with the Horse Protection Act because this examination is conducted while the horse is standing still with one foot off the ground in an unnatural position and not while 'moving' as the [Horse Protection] Act requires." (Respondents' Appeal Pet. at 8.)

I disagree with Respondents' contention that the Horse Protection Act requires that horses must be examined while they are moving. Respondents appear to be confusing the definition of "sore" under the Horse Protection Act with an examination used to determine if a horse is sore. Under the Horse Protection Act, the term "sore" describes a horse, which, as a result of the use of a substance or practice, suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness *when moving*. However, the Horse Protection Act does not specify the examination required to make the finding that the horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when moving.

Dr. Slauter testified he can determine, based upon a horse's reaction to palpation, whether it is reasonable to expect that the horse will experience pain when moving, as follows:

BY MS. CARROLL:

Q. I may have already asked this, but if I have, please let me know.

I wanted to ask how you determine that what the horse is presenting to you during your examination is a response to pain rather than to some other condition.

[BY DR. SLAUTER:]

A. There's a number of conditions that can cause pain, but when you get on a horse's foot and you find localized areas of pain, local lesions, localized areas of pain that are consistent and repeatable, and in this case the horse that we're talking about here today, it was bilateral, areas of consistent repeatable pain, localized areas of pain, not just on one foot, but two feet. And you do not see that generalized areas of pain around the pastern, but you see areas of - - localized areas of pain where you go back and you consistently repeatedly get those pain responses and those are areas where action devices will hit, on those localized areas, and if that horse is exhibiting pain when it's not moving or at least when I have my hands on its foot, it's not moving, it's reasonable for me to expect that when that horse gets into the show ring, you know, hit with speed and the action devices on this particular horse coming down on those areas, that that horse will experience even more pain and stress on his front limbs.

Tr. 29-30.

Similarly, Dr. Smith testified he determined, based upon Double Pride Lady's reaction to palpation, that Double Pride Lady would have suffered pain if she had been shown at the National Walking Horse Trainers Show, as follows:

[BY MS. CARROLL:]

Q. Can you tell from your documentation whether this horse would have been in pain if it had been shown in the ring immediately following your examination?

[BY DR. SMITH:]

A. Yes.

Q. And what do you base that opinion on?

A. The locations of the painful areas on both those forefeet would be areas where an action device would fall.

Q. And what is – how does that tell you that the horse would be in pain?

A. If the horse feels pain when I am pressing on the painful areas gently, with the flat of my thumb, certainly the pressure of a chain coming down on that area as the horse not only walks but canters, trots in the ring, would definitely cause pain to the horse.

Q. Would that be the case – would there be pain if there were not action devices?

A. Well, the fact that I can elicit pain just by touching him, I think indicates that the area is painful. Action devices would certainly enhance that pain.

Tr. 106-07.

Moreover, Dr. Slauter and Dr. Smith did observe Double Pride Lady's movement and, in part, based their determinations that Double Pride Lady was sore on their observations of her movement (CX 9, CX 10). Drs. Slauter and Smith testified about Double Pride Lady's movement and the conclusions they drew from the manner in which Double Pride Lady moved, as follows:

[BY MS. CARROLL:]

Q. And can you tell from your documentation whether this horse would have been in pain if it had been shown in the ring?

[BY DR. SLAUTER:]

A. Yes, in my professional opinion, that horse would have experienced pain in the show ring.

Q. And what is that opinion based on?

A. It's based on my findings and the fact that the horse led up reluctantly. My observation of two DQPs who checked the horse before I did, both of them found the horse to be bilaterally sore.

. . . .

BY MS. CARROLL:

Q. Based on your documentation which contains the statement that the horse's way of going was stiff.

[BY DR. SMITH:]

A. Un-huh.

Q. Or appeared a little stiff, would you believe that this horse would experience pain if it were shown in the show ring

immediately following your examination?

A. I'd have to say yes because he's already showing me by his locomotion that something's not right. Now when I said that I didn't know earlier about whether or not the horse was going to experience pain, I was specifically addressing those painful areas to palpation, and looked at the whole picture of this particular horse, the fact that he was already abnormal as far as his locomotion went. Horses don't walk cautiously without a reason. There's something that's causing him to walk stiff, so that there's something going on.

Tr. 46, 109-09.

Sixth, Respondents contend the ALJ erroneously gave no weight to Charles L. Thomas' testimony (Respondents' Appeal Pet. at 9-10).

Respondents do not cite the portion of the Initial Decision and Order in which the ALJ states that he gives no weight to Charles L. Thomas' testimony, and I cannot locate the portion of the Initial Decision and Order in which the ALJ states that he gives no weight to Charles L. Thomas' testimony.

I have carefully reviewed Charles L. Thomas' testimony. On the basis of that review, I find Charles L. Thomas credible. However, Charles L. Thomas' testimony does not rebut Complainant's evidence that Double Pride Lady was sore. Charles L. Thomas testified that he observed Double Pride Lady's movement, but did not examine her. Charles L. Thomas also testified that, when he observed Double Pride Lady, he formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act and could not testify regarding whether Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the National Walking Horse Trainers Show. (Tr. 129, 134, 138, 145-50.)

Respondents also contend Charles L. Thomas was the chief witness for the United States Department of Agriculture during the administrative hearing in *In re William Earl Bobo*, 53 Agric. Dec. 176 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995), and the United States

Department of Agriculture "considers Mr. Thomas to be a valid witness when he is testifying for the [United States Department of Agriculture's] side that a horse was sore, but that his testimony deserves 'zero weight' when he is testifying for a [r]espondent that the [r]espondent's horse was not sore." (Respondents' Appeal Pet. at 10.)

Again, Respondents fail to cite, and I cannot locate, any portion of the Initial Decision and order in which the ALJ states that he gives Charles L. Thomas' testimony no weight. Moreover, Charles L. Thomas testified that he has appeared on behalf of the respondents in a number of administrative proceedings conducted under the Horse Protection Act, but that he has "never testified for the government." (Tr. 138.) A review of *In re William Earl Bobo* reveals that Respondents' contention that Charles L. Thomas as the chief witness for the United States Department of Agriculture is not correct and that, in *In re William Earl Bobo*, Charles L. Thomas testified on behalf of the respondents. *See In re William Earl Bobo*, 53 Agric. Dec. 186.

Seventh, Respondents contend the United States Department of Agriculture takes the position that palpation is 100 percent accurate, subject to no possibility of error (Respondents' Appeal Pet. at 10).

The United States Department of Agriculture has long held that palpation is a highly reliable method for determining whether a horse is "sore," as defined in the Horse Protection Act.[12] The United States Department of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act. However, the United States Department of Agriculture does not take the position that palpation is 100 percent accurate and not subject to error. Respondents do not cite any basis for their assertion that the

United States Department of Agriculture takes the position that palpation is 100 percent accurate and not subject to error, and I cannot locate any case in which the Judicial Officer has taken that position.

Eighth, Respondents contend the United States Department of Agriculture does not admit or consider any evidence that contradicts testimony given by veterinarians employed by the United States Department of Agriculture and does not consider evidence that challenges the United States Department of Agriculture's "political and programmatic agenda"[13] (Respondents' Appeal Pet. at 10-11).

Section 1.141(h)(1)(iv) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)) provides that evidence may be excluded only as follows:

> **§ 1.141 Procedure for hearing.**
>
> **. . . .**
>
> **(h) *Evidence* – (1) *In general.* . . .**
>
> **. . . .**
>
> **(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.**

7 C.F.R. § 1.141(h)(1)(iv).

Section 1.141(h)(1)(iv) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)) does not provide that an administrative law judge or the Judicial Officer may exclude evidence merely because the evidence contradicts testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenges the United States Department of Agriculture's "political and programmatic agenda." Respondents do not cite any proceeding in which an administrative law judge or the Judicial Officer excluded evidence merely because the evidence contradicted testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenged the United States Department of Agriculture's "political

and programmatic agenda." Moreover, I cannot locate any administrative proceeding conducted under the Rules of Practice in which an administrative law judge or the Judicial Officer excluded evidence merely because the evidence contradicted testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenged the United States Department of Agriculture's "political and programmatic agenda." Further still, the record in this proceeding does not indicate that the ALJ excluded evidence because the evidence contradicted Dr. Slauter's or Dr. Smith's testimony or because the evidence challenged the United States Department of Agriculture's "political and programmatic agenda."

Ninth, Respondents contend United States Department of Agriculture administrative proceedings conducted under the Horse Protection Act are unfair because the veterinarians and investigators who testify, the attorneys who represent the complainants, and the administrative law judges who preside at the hearings are all employees of the United States Department of Agriculture (Respondents' Appeal Pet. at 12-13).

Dr. Slauter and Dr. Smith, the two veterinarians who testified in this proceeding; Colleen A. Carroll, the attorney who represents Complainant; and the ALJ were United States Department of Agriculture employees at the time of the hearing (Tr. 4, 14, 85, 334) While J.R. Odle, the investigator who testified, was not an employee of the United States Department of Agriculture at the time of the hearing, he was a former United States Department of Agriculture employee (Tr. 174). However, Respondents do not cite any authority for their contention that an administrative proceeding is unfair if the veterinarians and investigators who testify, the complainant's attorney, and the administrative law judge are all employed by the agency conducting the administrative proceeding. I find Respondents' contention is without merit.

An agency may combine investigative, adversarial, and adjudicative functions as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case does not participate in or advise in the decision or

agency review in the case or a factually related case. (5 U.S.C. § 554(d).)[14] Respondents do not assert that a United States Department of Agriculture employee or agent engaged in the performance of investigative or prosecuting functions in this proceeding, participated in or advised in the ALJ's Initial Decision and Order, or the agency review of the ALJ's Initial Decision and Order. Further, the record contains no indication that a United States Department of Agriculture employee or agent engaged in the performance of investigative or prosecuting functions in this proceeding, participated in or advised in the ALJ's Initial Decision and Order or the agency review of the ALJ's Initial Decision and Order.

Respondents also assert Dr. Slauter, Dr. Smith, J.R. Odle, Colleen A. Carroll, and the ALJ traveled together to the hearing, ate lunch together, and appeared "to be a team" (Respondents' Appeal Pet. at 13).

Respondents do not cite, and I cannot locate, any evidence that supports Respondents' assertion that Dr. Slauter, Dr. Smith, J.R. Odle, Colleen Carroll, and the ALJ traveled together to the hearing, ate lunch together, and appeared "to be a team."

Tenth, Respondents contend administrative law judges in United States Department of Agriculture administrative proceedings are biased in favor of the United States Department of Agriculture (Respondents' Appeal Pet. at 13-16).

Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality.[15] Further, the Administrative Procedure Act requires an impartial proceeding, as follows:

> § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision
>
> . . . .
>
> (b) There shall preside at the taking of evidence –
>
> (1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

. . . The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b).

However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair.[16] Respondents cite no evidence that indicates the ALJ was biased in favor of Complainant in this proceeding. I have reviewed the record in this proceeding, and I find no basis for Respondents' contention that the ALJ was biased in favor of Complainant in this proceeding.

The Administrative Procedure Act contains a number of provisions designed to ensure independent decision-making by administrative law judges may only be removed for good cause established and determined by the Merit Systems Protection Board on the record after an opportunity for hearing before the Merit Systems Protection Board (5 U.S.C. § 7521). Second, the Administrative Procedure Act prohibits an administrative law judge from consulting a person or party on a fact in issue, unless on notice and opportunity for all parties to participate (5 U.S.C. § 554(d)(1)). Third, the Administrative Procedure Act prohibits an administrative law judge from being responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the agency (5 U.S.C. § 554(d)(2)). Fourth, the Administrative Procedure Act prohibits an employee or agent engaged in the

performance of investigative or prosecuting functions for an agency in a case from participating in or advising in the decision in that case or a factually related case (5 U.S.C. § 554(d)).

In response to questions by William J. Reinhart, the ALJ explained the employment status of administrative law judges and the protections designed to ensure that administrative law judges can render impartial decisions, as follows:

> JUDGE BERNSTEIN: Okay. Before we conclude the hearing, is there anything else that we need to refer to before closing this record?
>
> MS. CARROLL: No.
>
> MR. REINHART: Yes. I would like to make an inquiry of you, Your Honor. I saved this until the end of the hearing on purpose. I would like for you to explain to me what your status is as an administrative law judge. Are you an employee of the U.S. Department of Agriculture or are you an independent contractor – could you explain your status? And I'm not saying that in any derogatory way. I'm saying that in terms that it will help me –
>
> JUDGE BERNSTEIN: It's a valid question. I am an employee of the United States Department of Agriculture. I was selected as a federal administrative law judge through a selection process that involves a rigorous evaluation of my credentials, many references, a written examination and an oral interview. Administrative law judges with the federal government, if they've been selected, have their names placed on a register filed by the Office of Personnel Management. From that register, they are selected by the agency for whom they are employed. And as I've indicated, I am an employee of the United States Department of Agriculture just as federal circuit, district and supreme court judges are employees of the federal government and state judges are employees of the state government.
>
> I am not evaluated as to my performance by the Department of Agriculture, they are not allowed to evaluate my performance, they are not allowed to comment upon my decisions one way or the other. This is to guarantee the independence of federal administrative law judges. Federal

administrative law judges cannot receive any bonuses, they cannot receive any awards for their work other than their pay and they cannot be penalized in any way for their decisions. This is all to guarantee their independence.

Any questions?

MR. REINHART: Yes. Do you have life tenure?

JUDGE BERNSTEIN: Yes.

MR. REINHART: You're appointed for life.

JUDGE BERNSTEIN: Yes.

MR. REINHART: And you can only be removed for cause.

JUDGE BERNSTEIN: Yes.

MR. REINHART: Same requirements as any federal judge, district judge –

JUDGE BERNSTEIN: Essentially the same.

MR. REINHART: And you work exclusively for the Department of Agriculture?

JUDGE BERNSTEIN: Yes.

MR. REINHART: Thank you.

JUDGE BERNSTEIN: Any other questions?

(No response.)

Tr. 334-46.

Respondents do not cite, and I cannot locate, any evidence that indicates the ALJ's independence was compromised in any way or that an employee of the United States Department of Agriculture violated the Administrative Procedure Act.

Eleventh, Respondents contend the Judicial Officer's role in United States Department of Agriculture administrative proceedings is to enforce the United States Department of Agriculture's "political or policy agenda"[17] (Respondents' Appeal Pet. at 14-16). Respondents do not cite any basis for their contention that the Judicial Officer's role is to enforce the United States Department of Agriculture's "political or policy agenda."

The Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), also called the Schwellenbach Act, authorized the Secretary of Agriculture to delegate regulatory functions to an employee of the United States

Department of Agriculture. Pursuant to the Schwellenbach Act, the Secretary of Agriculture delegated authority to the Judicial Officer to act as final deciding officer in adjudicatory proceedings instituted under the Horse Protection Act (7 C.F.R. § 2.35). Neither the Schwellenbach Act nor the delegation of authority from the Secretary of Agriculture to the Judicial Officer describes the Judicial Officer's role as the enforcer of the United States Department of Agriculture's "political or policy agenda."

The mission of the Judicial Officer is to issue final decisions in United States Department of Agriculture adjudicatory proceedings. The goal of the Judicial Officer is to issue final decisions which are clearly written, well-reasoned, and consistent with United States Department of Agriculture policy and the law.

United States Department of Agriculture policy requires that the Judicial Officer render impartial decisions in administrative proceedings. A number of statutory and regulatory provisions and institutional practices are designed to ensure that the Judicial Officer can render impartial decisions in administrative proceedings. The Administrative Procedure Act requires that the functions of the Judicial Officer must be conducted in an impartial manner (See 5 U.S.C. § 556(b)). Between the institution of a proceeding and the issuance of a final decision, the Judicial Officer is prohibited from discussing ex parte the merits of a proceeding (See 5 U.S.C. § 557(d); 7 C.F.R. § 1.151). The Judicial Officer has no responsibility for investigation, prosecution, or advocacy and is not responsible to, supervised by, or directed by any employee or agent engaged in the investigative or prosecuting functions of the United States Department of Agriculture.[18]

Further, no United States Department of Agriculture employee or official has ever discussed the merits of an ongoing administrative proceeding with me, without the opportunity for all parties to the proceeding to be present. During my employment as the Judicial Officer, my performance has never been evaluated and I have never been rewarded, promoted, demoted, penalized, or reprimanded for a decision, ruling, or any other action.

Twelfth, Respondents contend the Horse Protection Act is an unconstitutional exercise of power under the Commerce Clause of the United States Constitution because activities regulated under the Horse Protection Act do not affect interstate commerce (Respondents' Appeal Pet. at 16-27).

Respondents raised this very same issue before the ALJ. The ALJ opined that the Horse Protection Act regulates activities that substantially affect interstate commerce and is not unconstitutional (Initial Decision and Order at 8-10). I agree with the ALJ's opinion. Moreover, with minor modifications, which are reflected in this Decision and Order, *supra*, I agree with the ALJ's discussion of this issue. Therefore, I reject Respondents' contention that the Horse Protection Act is an unconstitutional regulation of intrastate (sic) activity in violation of the Commerce Clause.

Thirteenth, Respondents contend the Horse Protection Act is not necessary because the National Horse Show Commission prohibits the showing of sore horses (Respondents' Appeal Pet. at 25-26).

I disagree with Respondents' contention that the Horse Protection Act is not necessary. Contrary to Respondents' contention that the Horse Protection Act is unnecessary, Congress makes a specific finding in section 3(5) of the Horse Protection Act (15 U.S.C. § 1822(5)) that regulation under the Horse Protection Act by the Secretary of Agriculture is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce. The primary purpose of the Horse Protection Act is to stop the cruel, inhumane, and unfair practice of soring horses (15 U.S.C. § 1822(1)-(2)). Congress specifically addressed the need for the Horse Protection Act in connection with legislative history applicable to 1976 Horse Protection Act amendments, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public

Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horse and imposing significant penalties of violations of the Act. It was intended to prohibit the shoring of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the p[a]stern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition, the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions

continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The facts in this proceeding and other proceedings that have been appealed to the Judicial Officer establish that the practice of soring horses has not stopped.[19] Despite the efforts of the national Horse Show Commission to stop the showing of sore horses, the practice of soring horses continues and the Horse Protection Act is necessary. Therefore, I reject Respondents' contention that the Horse Protection Act is unnecessary because the National Horse Show Commission prohibits the showing of sore horses.

Moreover, even if I found the Horse Protection Act unnecessary (which I do not find), that finding would have no effect on the outcome of this proceeding.

Fourteenth, Respondents contend the Horse Protection Act violates the Tenth Amendment of the United States Constitution (Respondents' Appeal Pet. at 26).

The Tenth Amendment to the United States Constitution provides, as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

Respondents cite *New York v. United States*, 505 U.S. 144 (1992), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in support of their contention that the Horse Protection Act violates the Tenth Amendment to the United States Constitution. In *New York v. United States*, the Supreme Court held the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 infringed upon state sovereignty in violation of the Tenth Amendment to the United States Constitution because the provision required the states to regulate. 505 U.S. at 178. In *Gregory v. Ashcroft*, the High Court stated that the authority of the people of the states to determine the qualifications for office of state government officials is a power reserved to the states under the Tenth Amendment and the Guarantee Clause of the United States Constitution. 501 U.S. at 463.

The Horse Protection Act does not require states to regulate and does not infringe on the authority of the people of the states to determine the qualifications for office of state government officials. Therefore, I find *New York v. United States* and *Gregory v. Ashcroft* inapposite, and I find no basis for Respondents' contention that the Horse Protection Act violates the Tenth Amendment to the United States Constitution.

Fifteenth, Respondents contend the "finding" of the ALJ was not supported by evidence in the record (Respondents' Appeal Pet. at 28).

Respondents do not identify which finding of fact they believe is not supported by evidence in the record. I have reviewed the entire record in this proceeding. Except with respect to the ALJ's findings regarding co-ownership of Reinhart Stables and Double Pride Lady, I find that the ALJ's findings of fact are supported by reliable, probative, and substantial evidence.

Respondents seek dismissal of the proceeding and referral of the proceeding to a United States district court (Respondents' Appeal Pet. at 28-29).

I find no basis for dismissal of this proceeding. The Judicial Officer has no authority under the Rules of Practice to refer a proceeding to a district court of the United States.[20] Moreover, appeal of this proceeding does not lie to any United States district court. Instead, section 6(b)(2) and (c) of the Horse Protection Act (15 U.S.C. § 1825(b)(2), (c)) provides that a person against whom a violation is found a civil sanction is imposed may obtain judicial review in the court of appeals of the United States for the circuit in which such person resides or has his or her place of business or the United States Court of Appeals for the District of Columbia Circuit.

Respondents' Motion Requesting A List of Citations

Respondents request the citations of any cases instituted by the United States Department of Agriculture under the Horse Protection Act after June 7, 1995, in the United States Court of Appeals for the Firth Circuit (Motion to Request Documents).

Disciplinary administrative proceedings instituted under the Horse Protection Act are required to be instituted before the Secretary of Agriculture (15 U.S.C. § 1825(b)). I am not aware of any administrative proceeding under the Horse Protection Act in which the complainant instituted the proceeding in the United States Court of Appeals for the Fifth Circuit. Moreover, I am not aware of any document listing citations to administrative proceedings instituted by the United Department of Agriculture under the Horse Protection Act in the United States Court of Appeals for the Fifth Circuit. Therefore, Respondents' Motion to Request Documents is denied.

Respondents' Motion for Transcript

Respondents request that I provide the hearing transcript to them at no cost (Motion Re: Administrative Law Judge's Decision and Order). Section 1.141(i)(3) of the Rules of Practice (7

C.F.R. § 1.141(i)(3)) provides that transcripts of hearings shall be made available to any person at actual cost of duplication. Therefore, Respondents' request for a transcript at no cost is denied.

Respondents state that they want the transcript of the hearing in order to address the ALJ's reference in the Initial Decision and Order to William J. Reinhart's age and health. The ALJ states "[w]ere it nor for Mr. Reinhart's age and ill health, the penalties assessed would be much harsher." (Initial Decision and Order at 12.) Complainant proposes that I delete the ALJ's reference to William J. Reinhart's age and health, and I disqualify William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for 8 years (Complainant's Response to Respondent William J. Reinhart's Motion Re: Administrative Law Judge's Decision and Order at 3).

I do not adopt the ALJ's reference to William J. Reinhart's age and health in this Decision and Order. Age and health are not relevant factors to be taken into consideration when determining the appropriate sanction for a violation of the Horse Protection Act.[21] I reject Complainant's proposal to increase the period of disqualification imposed on William J. Reinhart by the ALJ from 5 years to 8 years. I find that a 5-year disqualification is sufficient to deter William J. Reinhart and other potential violators from future violations of the Horse Protection Act.

Complainant's Appeal Petition

Complainant contends the ALJ erroneously found Reinhart Stables is merely a name under which William J. Reinhart does business and erroneously declined to find Reinhart States violated sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)) (Complainant's Appeal Pet. at 1). Complainant asserts Reinhart Stables is a partnership, which has been owner and operated by William J. Reinhart and Judith Reinhart since 1980, and Reinhart Stables is the owner of Double Pride Lady (Complainant's Appeal Pet. at 4-5).

Complainant, as the proponent of an order, has the burden of proof in this proceeding,[22] and the standard of proof by which this burden is met is the preponderance of the evidence standard.[23] While the record does contain some evidence that Reinhart Stables is a partnership, I do not find that the evidence is sufficiently strong to reverse the ALJ. Further, I note Complainant did not allege that Reinhart Stables is a partnership. Instead, Complainant alleges that Reinhart Stables is an unincorporated association or a sole proprietorship (Amended Compl. ¶ 2) and states Reinhart Stables appears to be controlled by William J. Reinhart (Motion to Amend Compl. ¶ 5). Therefore, I reject Complainant's contention that Reinhart Stables is a partnership which has been owned and operated by William J. Reinhart and Judith Reinhart since 1980.

Moreover, I do not find that Reinhart Stables was the owner of Double Pride Lady when Double Pride Lady was entered at the National Walking Horse Trainers Show. While Complainant introduced some evidence that Reinhart Stables owned Reinhart Stables (CX 2), the preponderance of the evidence establishes that William J. Reinhart was the owner of Double Pride Lady on October 28, 1998 (CX 3, CX 6, CX 11, CX 12, CX 15). Therefore, I reject Complainant's contention that the ALJ erroneously failed to conclude Reinhart Stables violated sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)).

I agree with the ALJ's conclusion that Reinhart Stables is merely a name under which William J. Reinhart does business (Initial Decision and Order at 4), and I have restated the ALJ's Initial Decision and Order to eliminate those findings of fact and conclusions which appear to conflict with the ALJ's conclusion that William J. Reinhart does business as Reinhart Stables.

Order

1. William J. Reinhart is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture

Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

William J. Reinhart's payment of the civil penalty shall be forwarded to, and received by, Mr. Carroll within 60 days after service of this Order on William J. Reinhart. William J. Reinhart shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0013.

2. William J. Reinhart is disqualified for a period of 5 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

This 5-year period of disqualification is to be served consecutive to the disqualification of William J. Reinhart ordered in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). The disqualification shall become effective on the 60th day after service of this Order on William Reinhart.

3. William J. Reinhart has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which William J. Reinhart resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. William J. Reinhart must file a notice of appeal in such court within 30 days from the date of this Order and must

simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. (15 U.S.C. § 1825(b)(2), (c). The date of this Order is November 9, 2000.

Done at Washington, DC
November 9, 2000
/s/William G. Jenson
William G. Jenson
Judicial Officer

FOOTNOTES - APPENDIX G

1The ALJ also amended the caption of the proceeding which had previously been "*In re William J. Reinhart*" to read "*In re William J. Reinhart, an individual, and Reinhart Stables, an unincorporated association or sole proprietorship*" (Order Granting Complainant's Motion to Amend Complaint). The ALJ appears to have abandoned the caption in his Order Granting Complainant's Motion to Amend Complaint, and I have retained the caption adopted by the ALJ in his June 5, 2000, Decision and Order [hereinafter Initial Decision and Order].

2The Rules of Practice do not provide for a litigant's filing a response to a response to an appeal petition. However, a litigant may file, and I may grant, a motion requesting the opportunity to file a response to a response to an appeal petition. Respondents did not file a motion requesting the opportunity to file a response to Complainant's Response to Respondent's Appeal Petition. Therefore, I have not considered Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order.

3See note 2.

4A "Designated Qualified Person" or "DQP" is a person who is licensed by a horse industry organization or association having a DQP program certified by the United States Department of Agriculture. The management of any horse show, horse exhibition, horse sale, or horse auction may appoint DQPs to detect and diagnose horses which are sore and to otherwise inspect horses for the purpose of enforcing the Horse Protection Act. (15 U.S.C. § 1823(c); 9 C.F.R. §§ 11.1, .7.)

5The Atlanta Protocol is a memorandum authored by six veterinarians. The Atlanta Protocol contains procedures which the authors recommend Designated Qualified Persons follow when conducting inspections of horses at horse shows, horse exhibitions, horse sales, and horse auctions. Specifically, the authors of the Atlanta Protocol recommend that Designated Qualified Persons examine horses for inflammation and lameness, as well as for responses to digital palpation of the limbs. (RX 1.) The ALJ did not receive the Atlanta Protocol in evidence. However, the ALJ ordered the Atlanta Protocol marked as RX 1 and retained in the record as a rejected exhibit. (Tr. 259, 310-11.)

6*See New York v. United States*, 505 U.S. 144 (1992).

7*See Printz v. United States*, 521 U.S. 898 (1997).

8*See Gregory v. Ashcroft*, 501 U.S. 452 (1991).

9*See e.g. In re Jeanne and Steve Charter*, 59 Agric. Dec.___, slip op. at 4n.1 (Sept. 22, 2000) (in which the Judicial Officer rejected the complainant's

response to the respondents' appeal petition because the complainant's response reached the Hearing Clerk 1 day after the response was due); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (in which the Judicial Officer denied the complainant's oral request for an extension of time on the date the complainant's response to the respondent's appeal petition was due because the complainant made the oral request 13 minutes are the Hearing Clerk's office closed and, when the complainant nonetheless filed a response to the respondent's appeal petition, the Judicial Officer refused to consider the complainant's late-filed response), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3).

10*See In re Jack Stepp*, 59 Agric. Dec.___, slip op. at 6n.2 (May 23, 2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec.___, slip op. at 15-17 (Mar. 31, 2000) (Order Denying Pet. for Recons.) (Stating the administrative law judges and the Hearing Clerk are bound by the Rules of Practice and neither the administrative law judges nor the Hearing Clerk has the authority to modify the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judge are bound by the Rules of Practice). *Cf. In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has not authority to depart from the Rules of Practice Governing Proceedings on Petitions to Modify or To be Exempted from Marketing Orders).

11*See In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set for the in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

[12]*See, e.g., In re David Tracy Bradshaw*, 59 Agric. Dec.___, slip op. at 11, 18 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (5th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*,, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

[13]I am not certain of the meaning of Respondents' reference to evidence which challenges the United States Department of Agriculture's "political and programmatic agenda." However, the Rules of Practice identify evidence which shall be excluded insofar as practicable and there is no provision for the exclusion of evidence which challenges the United States Department of Agriculture's "political and programmatic agenda."

[14]*See also Sheldon v. SEC*, 45 F.3d 1515, 1518-19 (11th Cir. 1995) (holding that Securities and Exchange Commission proceedings do not violate the "separation of powers" or deny broker-dealers due process of law merely because the agency combines investigative, adversarial, and adjudicative functions); *Trust & Investment Advisers, Inc. v. Horsett*, 43 F.3d 290, 297 (7th Cir. 1994) (stating it has long been settled that the combination of investigative and adjudicative functions within an agency, absent more, does not create an unconstitutional risk of bias in administrative adjudication); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) (stating an agency may combine investigative, adversarial, and adjudicative functions, as long as no employees serve in dual roles); *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164, 167 (2d Cir. 1992) (stating the Administrative Procedure Act is violated only where an individual actually participates in a single case as both a prosecutor and an adjudicator); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979) (stating it is uniformly accepted that many agencies properly combine the functions of prosecutor, judge, and jury, and a hearing

conducted by such an agency does not automatically violate due process); *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940) (stating the blending of the functions of enforcement and adjudication in a single agency is not sufficient to invalidate a hearing fairly conducted); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1124 (1998) (stating an agency may combine investigative, adversarial, and adjudicative functions, as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case, does not participate in or advise in the decision or agency review in the case or a factually related case), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam).

15 *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (stating a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (stating any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998) (stating due process guarantees a hearing concerning the deprivation of life or a recognized property or liberty interest before a fair and impartial tribunal and this guarantee applies to administrative adjudications as well as those in the court), *cert. denied*, 525 U.S. 1068 (1999); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating essential to a fair administrative hearing is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating quasi-judicial proceedings entail a fair trial and fairness requires

an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating it is the essence of a valid judgment that the body that pronounces judgment in a judicial or quasi-judicial proceeding be unbiased); *Inland Steel Co. V. NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (stating trial by a biased judge is not in conformity with due process and the recognition of this principle is an essential in proceedings before administrative agencies as it is before the courts).

16 *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998) (stating an administrative law judge enjoys a presumption of honesty and integrity which is only rebutted by a showing of some substantial countervailing reason to conclude that the administrative law judge is actually biased with respect to factual issues being adjudicated), *cert. denied*, 525 U.S. 1068 (1999); *Akin v. Office of Thrift Supervision*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a reasonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judge's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1989) (stating a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating in order to maintain a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 f.2d 158, 164 (10TH Cir. 1976) (stating a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

17I am not certain of the meaning of Respondents' reference to the United States Department of Agriculture's "political or policy agenda." However, the Judicial Officer's functions are described in the Act of April 4, 1940 (7 U.S.C.

§§ 450c-450g), and in the § 2.35). Neither the Act of April 4, 1940, nor the delegation of authority from the Secretary of Agriculture to the Judicial Officer indicate that the role of the Judicial Officer is the enforcement of the United States Department of Agriculture's "political or policy agenda."

18Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 Geo. Was. L. Rev. 277, 284 (1957).

19 12*See, e.g., In re David Tracy Bradshaw*, 59 Agric. Dec.___, slip op. at 11, 18 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Stephen Douglas Bolton*, 58 Agric. Dec. 254 (1999); *In re Jack* Stepp, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (5th Cir. 1999) (not to be cited as precedent under 6th Circuit rule 206); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543 (1997); *In re David Hubbard* (Decision as to David Hubbard), 56 Agric. Dec. 617 (1997); *In re Carl Edward & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards) 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Billy Jacobs*, Sr., 56 Agric. Dec. 504 (1996), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); In *re Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re Johnny E. Lewis*, (Decision on Remand as to Jerry M. Morrison), 55 Agric. Dec. 246 (1996), *aff'd per curiam*, 111 F.3d 897 (11th Cir. 1997); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (5th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*,, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, (1993); aff'd, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); In *re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Linda Wagner*

(Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman*)Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181 (1978).

20*In re Jack Stepp*, 59 Agric. Dec.___, slip op. at 4 (Apr. 26, 2000) (Order Lifting Stay); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302, 305 (1999) (Order Denying Pet. for Recons. and Mot. To Transfer Venue). *Cf. In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 392 (1997) (stating the chief administrative law judge does not have authority to transfer a case to a district court of the United States under the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

21*Cf. In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 96-97 (1997) (Order Denying Pet. for Recons.) (Stating the respondent's age is not a relevant factor to be taken into consideration when determining the appropriate sanction for violations of the Agricultural Marketing Agreement of 1937, as amended); *In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating the respondent's age cannot be considered either as a defense to the respondent's violations of the Animal Welfare Act, as amended [hereinafter the Animal Welfare Act], or as a mitigating factor to be taken into consideration when determining the appropriate sanction for a violation of the Animal Welfare Act); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 258 (1997) (stating the failing health of the corporate respondent's president cannot be considered either as a defense to the respondent's violations of the Animal Welfare Act or as a mitigating factor to be taken into consideration when determining the appropriate sanction for a violation of the Animal Welfare Act), *aff'd*, 172 F.3d 51, 1999 WL 16562 (5th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999).

22*See* U.S.C. § 556(d).

23*See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re David Tracy Bradshaw*, 59 Agric. Dec.___, slip op. at 11, 18 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Carl Edward & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards) 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Jim* Singleton, 55 Agric. Dec. 848, 850 n.2 (1996); *In re*

Keith Becknell, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (5th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, (1993); aff'd, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re John Allan Callaway, 52 Agric. Dec. 272, 284 (1993); In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman*)Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181 (1978).

APPENDIX H

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 99-0013

IN RE:
WILLIAM J. REINHART AND
REINHART STABLES,
RESPONDENTS

Filed June 5, 2000

DECISION AND ORDER

This proceeding was instituted pursuant to the Horse Protection Act, as amended, 15 U.S.C. § 1821 *et seq.* (the "Act") by a Complaint filed on March 10, 1999, by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") of the United States Department of Agriculture ("USDA"). The Complaint alleged that on October 28, 1998, Respondents violated the Act by entering for the purpose of showing or exhibiting the horse known as "Double Pride Lady" at a horse show while the horse was sore as prohibited by the Act and its regulations. Respondents filed an Answer in which they denied that they violated the Act and the regulations pursuant to the Act, 9 C.F.R. § 11.1 *et seq.*

I presided over a hearing on October 13 and 14, 1999 in Nashville, Tennessee. Complainant was represented by Colleen A. Carroll, Esq., Office of the General Counsel, USDA. Respondents were represented by William J. Reinhart, pro se, of Manchester, Tennessee. Complainant's exhibits are referred to as "CX"; Respondents' exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr." The parties filed proposed findings of fact, proposed conclusions of law, and briefs. In addition, Respondent filed a Motion for Dismissal on January 27, 2000. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been

adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

1. Respondent William J. Reinhart ("Mr. Reinhart") is an owner of the horse known as "Double Pride Lady" and an owner of Respondent Reinhart Stables. His mailing address is 3878 Murfreesboro Highway, Manchester, Tennessee 37355.

2. Mr. Reinhart and his wife, Judith Reinhart, conduct business as "Reinhart Stables" and are the owners of the horse known as "Double Pride Lady." (Tr. 198, Tr. 201). Reinhart Stables' mailing address is 3878 Murfreesboro Highway, Manchester, Tennessee 37355.

3. Mr. Reinhart, as co-owner of Reinhart Stables, employed Jack Stepp, full-time, as a trainer of "Double Pride Lady." (Tr. 190-191).

4. On October 28, 1998, Mr. Reinhart entered for the purpose of showing or exhibiting "Double Pride Lady" as Entry No. 146 in Class No. 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee. (CX 2-5). On the entry forms, Mr. Reinhart listed Reinhart Stables as the owner of "Double Pride Lady." (CX 2). The fee for entering the horse was paid by check drawn on the bank account of "William J. or Judy F. Reinhart" and signed by Mr. Reinhart. (CX 5).

5. At the show, both Designated Qualified Persons ("DQPs") Mark Thomas and Bob Flynn examined "Double Pride Lady" and determined that the horse was sensitive in both front feet. DQP Thomas and DQP Flynn refused to allow the horse to be shown. (Tr. 46-47; CX 9, 10).

6. Two USDA Veterinary Medical Officers ("VMOs") were assigned to the show. They were Dr. David Smith, the "show vet" or the lead veterinarian assigned to supervise the paperwork, and Dr. Edward Slauter. VMOs routinely double-check the work of the DQPs, randomly examine pre-show entries to determine if they are

sore, and periodically check entries after they show in their class (Tr. 19-21, 87-89).

7. Dr. Slauter had been practicing veterinary medicine for 27 years at the time of the show. For the past 10 years, he has been a VMO with APHIS (Tr. 14-16). He has personally examined at least 300 horses for compliance with the Horse Protection Act and has overseen inspections of several thousand horses by DQPs (Tr. 20-21). He is extremely qualified and experienced in examining horses. I found him to be a forthright and credible witness.

8. Dr. Slauter testified that he observed DQP Thomas examine "Double Pride Lady," who "led up to the inspection area very reluctant to move" (CX 9; Tr. 45). After DQP Thomas and DQP Flynn had palpated the horse, finding it to be sensitive, Dr. Slauter checked the horse (CX 9; Tr. 46-47). Dr. Slauter repeatedly palpated the horse, finding it to be bilaterally sore. He found the horse to be sore at the pastern of the left foot just above the bulb of the heel and on the medial and lateral aspects of the right pastern (CX 9; Tr. 47). Dr. Slauter did not specifically remember his examination of "Double Pride Lady," but testified that his affidavit and other statements in writing at the time were accurate (Tr. 40-41). Dr. Slaughter [sic] then asked Dr. Smith to independently examine the horse (Tr. 47-48).

9. Dr. Smith had been practicing veterinary medicine for 11 years at the time of the show. He has held a position with APHIS for the past three years (Tr. 85). He has examined approximately 300 to 600 horses for compliance with the Horse Protection Act (Tr. 89). He is extremely qualified and experienced in examining horses and I found him to be a forthright and credible witness.

10. Dr. Smith did not specifically remember his examination of "Double Pride Lady," but testified that his statements in writing at the time were accurate (Tr. 102). Dr. Smith found consistent and repeatable pain responses on the horse's pastern on the medial and lateral heel bulbs of the left foot and on the medial and lateral aspects of the pastern of the right foot (CX 10).

11. After their examinations, Drs. Slauter and Smith agreed that

the horse was bilaterally sore according [to] the Act (CX 9, 10).

Conclusions of Law

1. On October 28, 1998, Respondent William J. Reinhart, acting as an owner of Reinhart Stables, violated section 5(2)(B) of the Act (15 U.S.C. § 1842(2)(B)), by entering for the purpose of showing or exhibiting the horse known as "Double Pride Lady" as Entry No. 146 in Class No. 21, at the National Walking Horse Trainers Show at Shelbyville, Tennessee, while the horse was sore.

2. Respondent Reinhart Stables is merely a name under which Respondent William J. Reinhart does business.

Discussion

In enacting the Horse Protection Act, Congress found "that the soring of horses is cruel and inhumane" and that horses sored for the purpose of improving their gait compete unfairly with horses that are not sored. 15 U.S.C. § 1822. Congress made it unlawful to (1) show or exhibit a sore horse; (2) enter for the purpose of showing or exhibiting a sore horse; or (3) allow the showing of a sore horse. 15 U.S.C. § 1824. The term "sore" describes a horse on which any substance or practice has been used which causes, or may reasonably be expected to cause, the horse "physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving." 15 U.S.C. § 1821(3).

Based on the credible testimony of Drs. Slauter and Smith, I found "Double Pride Lady" to be sore when she was entered into the National Walking Horse Trainers Show on October 28, 1998. Drs. Slauter and Smith, who examined "Double Pride Lady," are experienced and qualified veterinarians and were credible witnesses. Both veterinarians found strong and definite paid responses when they independently palpated the horse's pasterns (Tr. 47, 100; CX 9, 10). Abnormal sensitivity in a horse's forelimbs raises a rebuttable presumption that the horse has been sored. *See In re Landrum*, 40 Agric. Dec. 922, 925-926 (1981).

Respondent William J. Reinhart contends that palpation

alone is not sufficient to determine whether or not a horse is sore. He also believes that the VMOs' examinations should be deemed unreliable because Complainant fails to "cite one scientific study or any medical data" that supports palpation as a reliable means for determining soreness in horse (Tr. 12, 13, 328, 329) and because the Atlanta Protocol, a series of tests developed by equine veterinarians who concluded that palpation is not an effective measure for determining the soreness of a horse, should be the accepted procedure in this case. This protocol calls for the inspector to look for inflammation (indicated by redness, swelling, pain, heat, interference with function, etc.) and lameness, in addition to digitally palpating the pasterns of the horse. Respondent also cites to *Young v. United States Dep't of Agric.*, 53 F.3d 728, 730 (5th Cir. 1995), which held that palpation alone is an insufficient method for determining soreness as "the JO of the Department of Agriculture could not point to scientific or medical data supporting the agency's chosen diagnostic technique" (Respondents' Briefs, 10-11).

The palpation technique has been in use by USDA for the past 30 years. It has been held to be the accepted method of determining soreness by the Judicial Officer and the two circuits in which this case may be appealed. In *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1412-1414 (6th Cir. 1995), the Court held that "pursuant to the statute, the agency need not show inflammation or lameness in addition to a pain reaction in order to conclude that a horse is 'sore' under the HPA," and the horse's reaction to digital palpation is sufficient to invoke the presumption that the horse is sore. In the other circuit in which this case may be appealed, the D.C. Circuit, the Court held in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49-50 (D.C. Cir. 1996), that palpation is an effective method for concluding that a horse is sore. In *In re Edwards*, 55 Agric. Dec. 892, 957-960 (1997), the Judicial Officer (the "JO") held that scientific basis for palpation is not necessary to be shown, and in *In re Bennett*, 55 Agric. Dec. at 180-181 the JO rejected the Atlanta Protocol and held that "palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act".

Respondent William Reinhart also contends that the VMOs' affidavits and written summaries are inadmissible hearsay because they were prepared in anticipation of litigation and do not meet the standard of evidence that was set out in *Young*, 53 F.3d 728 (1995). Respondent cites to *Palmer v. Hoffman*, 318 U.S. 109 (1943), which held that an accident report prepared by a railroad company did not carry the indicia of reliability of a routine business record because it was prepared at least partially in preparation of litigation and also cites to *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979), which held that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared in anticipation of litigation (Respondents' Brief, 9). Respondent further relies on the Fifth Circuit's holding in *Young*, 53 F.3d at 731, that the probative value of the VMOs' testimony and affidavits are limited because they were prepared in anticipation of litigation and because only observations concluding the horse was sore were included in the written statements, not any that would say otherwise.

Complainant's exhibits, specifically the affidavits, written reports, and testimony of the VMOs, are both reliable and probative. Under the Department's Rules of Practice, 7 C.F.R. § 1.141(h), and the Administrative Procedure Act, 5 U.S.C. § 556(d), this type of hearsay statement is admissible into evidence. As held in *In re Bennett*, "the business of the Animal and Plant Health Inspection Service under the Horse Protection Act is investigating and litigating, where violations are found. As law enforcement officers, it is the duty of VMOs to detect violations of the federal statute and to initiate the procedure for bringing disciplinary complaints against the violators. Hence, litigating is 'the inherent nature of the business in question,' and the preparation of the Summary of Alleged Violations form and affidavits is the most important of the 'methods systematically employed for the conduct of the business as a business.'" *In re Bennett*, 55 Agric. Dec. at 213-214 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 115 (1943)).

As this case cannot be appealed to the Fifth Circuit, the *Young* decision does not govern. The D.C. Circuit and the Sixth Circuit are the appellate courts that may hear this matter and, as

such, their views will determine whether hearsay is admissible. In *Crawford*, 50 F.3d at 48, the D.C. Circuit confirmed that "administrative agencies are not barred from reliance on hearsay evidence, which only need bear satisfactory indicia of reliability." Likewise, the Sixth Circuit held in *Bobo*, 52 F.3d at 1412-1414, that affidavits of and forms filled out by four veterinary medical officers were sufficient to invoke the presumption, for the purpose of charges against owner, that the horse was 'sore' within the meaning of the HPA provision prohibiting the showing of sore horses, despite the contention that affidavits were hearsay. Although in *Bobo*, three of the VMOs testified that they were unable to independently recall their examinations of this horse, they stated that they documented and signed their written statements in conjunction with their inspections while the details were fresh in their minds. The Court emphasized that the written forms and affidavits contained great detail concerning the examinations of the horse in question, and the owner and trainer were given the opportunity to cross examine the VMOs as to the content of these reports. *Bobo*, 52 F.3d at 1414.

In the case at bar, both Dr. Slauter and Dr. Smith testified that they did not independently recall their examinations of "Double Pride Lady." However, they also testified that they completed the forms in question and documented their findings in sworn statements while the facts were still fresh in their minds. Respondent William Reinhart also had the opportunity to cross-examine the VMOs regarding the content of their affidavits and forms. Therefore, these hearsay statements are both reliable and probative and are admissible.

Mr. Reinhart presented three witnesses; his wife Judith Reinhart; his trainer Jack Stepp, who was also sanctioned in this matter; and the steward at the show, Charles Thomas. None of the witnesses examined "Double Pride Lady" for compliance with the Act. Charles Thomas, who is a DQP, was only serving as a steward at this event. He merely viewed "Double Pride Lady's" movement but did not palpate her. He, along with Respondent's two other witnesses, was of the opinion that the horse was not sore at the time. This evidence of Respondents fails to rebut the testimony of the two DQPs and two VMOs stationed at the show who found

problems with the horse after they had palpated her.

Respondent further contends that the Horse Protection Act is unconstitutional as it does not fall within the confines of the Commerce Clause of the Constitution, and relies on *United States v. Lopez*, 514 U.S. 549 (1995), which held that a federal statute was invalid as it went beyond Congress' power to regulate commerce. In *Lopez*, the Gun-Free School Zones Act of 1990 created a federal crime for those violators who knowingly possessed firearms in "a place that the individual knows, or has reasonable cause to believe, is a school zone." *Lopez*, 514 U.S. at 551. The Court in *Lopez* held that the activity being regulated must substantially affect interstate commerce and bringing guns onto school grounds does not have a great enough effect on interstate commerce to qualify for regulation under the Commerce Clause. Mr. Reinhart compares his case to *Lopez* and argues that participation in a Walking Horse Exhibition is not a substantial enough effect on interstate commerce to warrant regulation under the Commerce Clause. Mr. Reinhart emphasizes that the prizes are minimal (only one hundred dollars or so) and argues that these shows are presented merely for leisurely purposes.

In another very recent limitation on Congress' power to regulate under the Commerce Clause, the Supreme Court in *United States v. Morrison*, Nos. 99-5, 99-29, 2000 WL 574361 (U.S. May 15, 2000), confirmed the holding that Congress' power to regulate through this clause is allowed only in situations in which the activity to be regulated, if not a channel or instrumentality of interstate commerce, substantially affects interstate commerce. In *Morrison*, the Court invalidated a federal statute that provided a federal civil remedy for victims of gender-motivated crimes. The Court held that crimes that are gender-motivated are not economic activity and their results do not affect interstate commerce.

While an administrative law judge may not dismiss a case based upon a finding of unconstitutionality of its governing statute, the judge may render an opinion on the issue. *See In re Utica Packing Co.*, 39 Agric. Dec. 590 (1980); *Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958). I do not

agree that the Horse Protection Act is unconstitutional.

Lopez defined the three categories of activity that Congress may regulate under the Commerce Clause. Congress may regulate the use of channels (roadways, railways, etc.) in interstate commerce; it may regulate and protect the instrumentalities, or persons and things involved in interstate commerce; and it may also regulate activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 91941). The Horse Protection Act falls within the third category, as it has a substantial affect on interstate commerce.

The Horse Protection Act regulates an industry, not just a leisurely activity as Respondent contends. Although this industry only allows minimal monetary returns in the form of prizes for the owner, it is a an (sic) occupation for the individuals who prepare the horses for competition. Those who train, groom, and transport the horses would be adversely affected if this statute were not in place. Not only does the soring of horses endanger the health of the animals, but it also could affect the employment status of those who service horses that are unfairly disadvantaged.

Mr. Reinhart also argues that the Act encroaches upon the sovereignty of the State of Tennessee, which also has a statute prohibiting the soring of horses. There are two situations where a federal statute may be seen as encroaching upon the sovereignty of the states. The first is where a federal statute compels a state to enact or enforce a particular law. *See New York v. United States*, 505 U.S. 144 (1992). The second is where a federal statute compels state or local officials to perform specific federal administrative tasks. *See Printz v. United States*, 521 U.S. 898 (1997). This statute neither requires Tennessee to enact or uphold a certain law nor does it require that state officials perform federally delegated tasks. The Department of Agriculture polices the shows, using its own officials, and holds violators accountable through its own administrative law procedures. Tennessee may still enforce its own statute and is not involved with the enforcement of the federal Horse Protection Act. Therefore, this act does not encroach upon

Tennessee's sovereignty.

Respondents also filed a Motion for Dismissal on January 27, 2000. In the motion, Respondents argued that the Complaint should be dismissed because of extensions granted to Complainant to file an Amended Complaint and to file a post-hearing brief. The motion is denied. The extensions were appropriate and caused no prejudice to Respondent.

Sanctions

The Horse Protection Act allows for the assessment of up to $2,000 in civil penalties for each violation. 15 U.S.C. § 1825(b)(1). The Act also provides for disqualification from the industry for anyone who is also assessed a civil penalty. This disqualification from industry participation is for a period of not less than one year for a first violation and for not less than five years for a second violation. 15 U.S.C. § 1825(c).

Complainant requests that Respondent William Reinhart be assessed a civil penalty of $2,000 and that he be disqualified from participating in the Walking Horse industry for at least five years. It also requests that this disqualification period be consecutive to, rather than concurrent with, the disqualification order for Mr. Reinhart issued in HPA Docket No. 94-0014, and recently affirmed by the Court of Appeals for the Sixth Circuit. Complainant also requests that Respondent Reinhart Stables be assessed a civil penalty of $2,000 and be disqualified for a period of one year.

The main purpose of the Horse Protection Act is to prevent the cruel and unfair practice of 'soring' horses. Since deterrence is the goal of this Act, monetary penalties are not enough to achieve this goal. The Judicial Officer has held that disqualification is an appropriate sanction in almost every Horse Protection Act case. In *In re Roland*, 40 Agric. Dec. 1934, 1951-52 (1981), the Judicial Officer stated:

> **'Congress has provided the Department with the "tools" needed to eliminate the practice of soring Tennessee Walking Horses. But they must be used, to be effective. In**

order to achieve the Congressional purpose of the Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on every horse owner (and trainer) who allows one of this horses to be exhibited while sore.'" [Footnote omitted].

See In re Howell and Denton, 54 Agric. Dec. 325 (1995); *In re Martin*, 53 Agric. Dec. 212, 237 (1994). *See also In re Callaway*, 52 Agric. Dec. 272, 295-96 (1993); *In re Stamper*, 42 Agric. Dec. 20, 44-64 (1983), *aff'd* 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

Respondent William Reinhart has violated the Horse Protection Act before. *See In re William J. Reinhart and Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd sub nom. Reinhart v. United States Dep't of Agric.*, No. 98-3765 (6th Cir., Aug. 13, 1999)(unpublished). Therefore, Mr. Reinhart should be disqualified from participating in the industry for a minimum of five years.

Complainant has been quite conservative in its request for sanctions. Mr. Reinhart has violated this same statute within the past ten years with the same trainer. Were it not for Mr. Reinhart's age and ill health, the penalties assessed would be much harsher. It certainly is appropriate to assess the minimum suspension allowed by the Act for a second violation.

As far as sanctions for Respondent Reinhart Stables are concerned, the evidence indicates that Reinhart Stables is merely a name under which William Reinhart was conducting business. Judith Reinhart, Mr. Reinhart's wife, testified that Reinhart Stables is owned and operated solely by herself and her husband (Tr. 198, 201). Thus, sanctioning Reinhart Stables would be redundant. Suspending Reinhart Stables from industry participation would also prove to be ineffective, since Mrs. Reinhart could still operate the stable either under her name or under a different name.

Therefore, I conclude that the sanctions requested by

Complainant for Respondent William J. Reinhart are appropriate, and that the sanctions requested for Respondent Reinhart Stables are inappropriate.

Order

1. Respondent William J. Reinhart is assessed a civil penalty of $2,000 which shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll, Esq.
Office of the General Counsel
Room 2014, South Building
U.S. Department of Agriculture
Washington, D.C. 20250-1417

within 20 days after the effective date of this order. The certified check or money order should include the docket number of this proceeding.

2. Respondent William J. Reinhart is suspended for a period of five years from exhibiting, showing, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, exhibition, or horse sale or auction. This suspension is to be served consecutive to the disqualification order issued in HPA Docket No. 94-0014. The provisions of the disqualification order shall become effective on the 30th day after service of this Order on Respondent.

This Decision and Order will become final and effective as to each Respondent 35 days after the date of service of a copy of this Order upon that Respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

/s/Edwin S. Bernstein
EDWIN S. BERNSTEIN
Administrative Law Judge
June 5, 2000

APPENDIX I

THE ATLANTA PROTOCOL

MEMORANDUM

TO: Cosigners
DATE: August 7, 1991
SUBJECT: Recommended Protocol for DQP Examinations

The following document represents the consensus of the cosigners as drafted from discussion notes made at the meeting at the Marriott Airport Hotel in Atlanta, Georgia on July 24, 1991.

DQP EXAMINATION PROCEDURES

The following are the procedures that DQP's shall be required to follow in conducting inspections at horse shows, exhibitions, sales, and auctions.

1. **It shall be a requirement that the overall horse be evaluated and that there shall not be reliance on any one factor to the exclusion of all others. The examination should concentrate on detection of heat, pain, swelling, redness and loss of motion. The examination must provide the opportunity to evaluate the horse's freedom of movement in locomotion.**
2. **The majority of the findings on physical examination should agree. Borderline judgment calls on palpation must be confirmed by evidence of abnormal gait on movement and vice versa.**
3. **The Horse protection Act provides, among other things, that a horse shall be considered "sore" if such horse "suffers or can reasonably be expected to suffer physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving. . ."**

I. <u>Movement on Locomotion</u>

A). The DQP shall direct the custodian of the horse to lead the horse for a reasonable distance, turning the horse on a short radius,

and returning to the DQP. An important factor for a DQP's determination of soreness is the horse's freedom of movement (*i.e.*, does the horse start off, lead, turn, and/or ride freely?). In this visual examination, the DQP needs to evaluate:

1. How the horse starts: Is he reluctant to start moving or does he begin freely and naturally?
2. How the horse turns: Does he turn freely in both directions?
3. How the horse leads: Does he lead and walk freely with a normal gait?
4. How the horse parks himself voluntarily when he stops: Does the horse park himself on a normal four-cornered stance or with a disproportionate amount of weight-bearing on the hind legs?

B). The DQP needs to consider the following:

1. The horse should exhibit an evenness of stride as opposed to stumbling, hopping, limping, or other signs of lameness.
2. The horse should exhibit a normal gait as recognized to be typical of a horse with built-up pads;
3. The horse should exhibit freedom of movement as opposed to reluctance to bear weight on his front limbs when standing, turning, or otherwise moving.

II. Digital Palpation

A). The digital palpation must be made in accordance with 9CFR 11.21 and any other appropriate regulations.

B). It must be recognized that reaction to palpation is not necessarily synonymous with soreness or pain. It should be further noted that digital palpation, in and of itself, is not a reliable diagnosis of soring. The DQP should recognize that horses have different tolerances for pain, and that reactions to palpation will vary in individual horses. This reaction may be in response to a reflex or learned behavior as well as pain.

C). Factors which shall be utilized in the palpation process:

1. It is important that any inspection or digital palpation be done within the comfort range of the individual animal, not extending or flexing the animal's limb beyond normal limits and picking up the foot in a manner which will not compromise the horse's balance or normal stance.

2. Prior to picking up the horse's foot, make sure the horse is standing in a balanced four-cornered stance.

3. Prior to picking up the horse's foot, introduce yourself to the horse, gentling him before picking up the foot in a professionally acceptable manner.

4. In the event there is a reaction to digital palpation of any area, allow the horse to calm himself and become accustomed to the palpation by patient repetition. This will help the inspector discriminate between pain and hypersensitivity.

5. The degree of pressure to be utilized during digital palpation shall not exceed that amount of pressure necessary to flatten the ball of the thumb. The distal thumb joint should not be "cocked" during palpation.

III. Riding

In order to assist in the evaluation, the DQP may request the horse to be ridden under saddle to further observe the horse's freedom of movement and to assist in completion of the examination.

In the event of uncertainty in overall findings, the benefit of the doubt should go in favor of the horse.

Endorsement of the foregoing represents the agreement of the following cosigners:

Raymond C. Miller, D.V.M.
Dewitt H. Owen, D.V. M.
D. L. Proctor, Jr., D.V.M.
Ram C. Purohit, D.V.M., Ph.D.
John R. Ragan, D.V.M.
J. T. Vaughan, D.V.M.

NOTE: This list of Veterinarians represents: three former presidents of the American Association of Equine Practitioners; the

then Dean of the Veterinary School at Auburn University of Alabama; a Veterinarian on staff at Auburn who was the author of the renowned "Auburn Study" on action devices; two field Veterinarians in Tennessee; and the State Veterinarian of Tennessee.